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## CURRENT EVENTS.

THE HOUSE OF LORDS.—On another page of this number will be found an interesting speech of Lord Coleridge on the House of Lords. It is remarkable if read judiciously between the lines, as well as upon the face of the paper, as indicating the present, and presaging the future tendency of enlightened public opinion regarding the venerable fossil of which it treats. He advocates a *reformed* House of Lords, composed of men who shall sit there, because they are "sent there by some system of choice." This, notwithstanding his careful hedging, "speaking roughly and off-hand, and I pray you remember, after dinner," means, when interpreted and read between the lines, and subjected to due judicial construction, that Lord Coleridge thinks that the House of Lords *as* House of Lords has outlived its usefulness, but that a second legislative chamber is essential to good government. He thinks that the members of such a chamber should not be born, and "swathed and dandled into legislators," but should be "chosen," and should be responsible for the due performance of their duties to the authority by which they are "chosen." He does not say so, certainly, but choice implies responsibility of the chosen to the chooser, and responsibility implies a fixed and definite term of service. His allusion to the American Senate is, in this point of view, very significant. Such a chamber as Lord Coleridge indicates would be a very good senate, provided its members shall be chosen by the proper authority and in such a manner as to secure adequate representation of the interests of the whole kingdom. It would, however, be in no proper sense a House of Lords. It is of the very essence of that body that its hereditary legislators represent nobody but themselves, and no interest except their own, are responsible to no constituency, and are amenable to no authority.

Whether there is among the peers a sufficient number of suitable persons to form the  
Vol. 23.—No. 18.

new chamber is an immaterial issue, for there are plenty of such persons outside of that charmed circle.

Any reform, any change worthy of the name, carried into effect in the spirit of Lord Coleridge's suggestions, must needs include three fundamental conditions: First, that the new legislators shall be "chosen and sent" by a body or bodies of persons who represent the interests of the whole kingdom. Second, that the choosing and sending bodies shall have full and free choice of the members from all classes of society, untrammelled by any relics of feudalism. Third, that the members so sent shall act under a proper sense of responsibility to their constituency, holding office for a definite, or at least, a terminable period, and amenable to all the impulses of an enlightened public opinion.

The existing House of Lords is manifestly an excrescence; for more than half a century its only political function has been, alternately to obstruct and succumb, and for that period England has had really but one legislative body. If it is expedient to have two, as is the received modern opinion, the new one must be created, but before that can be done a graver problem than is generally supposed will confront the innovators. The House of Lords must be abolished before the new chamber can be created, and if the great statesman to whom Lord Coleridge alludes, after having thought three times about abolishing the House of Lords, shall have finally resolved to do it, he will find before him an herculean undertaking.

As the House of Lords is an integral part of Parliament, its extinction can only be effected by revolution and re-construction, or by an act of Parliament, in assenting to which, that historic body would commit political suicide, decree its own dissolution and admit in the most solemn manner, that it is no longer worthy to bear more than a nominal part in the legislation of a great empire. That English peers could voluntarily do this is incredible; that they could be bribed or bullied into an act which to all the world would seem to be one of personal dishonor is equally impossible. What then remains except by the royal prerogative to fill the house with a sufficient number of new peers, who accept rank for a day only for the

purpose of dragging down to their own level those whose ancestors and predecessors have held that rank for centuries. Before any Statesman worthy of the name will (unless in the direst emergency) resort to such a measure for such a purpose, he will think, not three times, but three hundred times. The House of Lords may be undermined in the course of time by the steady growth of public opinion of which Lord Coleridge's speech is one of the most notable *indicia*, but most probably it will endure as long as any of the present elements of the English constitution.

### NOTES OF RECENT DECISIONS.

NEGLIGENCE—CONTRIBUTORY AND IMPUTED NEGLIGENCE—MASTER AND SERVANT—PASSENGER IN PRIVATE CARRIAGE.—On the 1st of October, 1886, the Supreme Court of Minnesota took a new departure on the subject of contributory negligence, or, more properly speaking, made a distinction which has not heretofore been generally recognized. And in doing so, it cuts loose from a line of decisions founded upon a legal fiction which is not only absurd upon its face, but exceedingly unjust in its operation. In *Follman v. City of Mankato*,<sup>1</sup> the court held that a passenger in a private carriage, riding in it upon the invitation of the owner thereof, who was himself driving it, is not affected by his negligence contributing to the disaster by which she was injured. That negligence is not imputed to her, and the city by whose negligence the disaster was primarily caused, was responsible in damages to her. A distinction is taken between public and private carriages, which, in our judgment, is unnecessary and misleading. The ruling in many cases has been that a passenger in a public carriage, may be deprived of his remedy for injuries inflicted by third persons, by proof of the contributory negligence of the driver of the vehicle. In a leading English case,<sup>2</sup> a passenger in an omnibus was killed by an accident to which the negligence of the driver of the omnibus contributed. In an action by his administrator against the other party,

whose negligence had caused the disaster, the court held that the negligence of the driver of the omnibus must be imputed to the passenger, plaintiff's intestate, because he "identified himself" with the driver by voluntarily becoming a passenger. In a later English case,<sup>3</sup> the court, Pollock, B., following *Thoroughgood v. Bryan*, comments on the language used in that case thus: "If it is to be taken that by the word 'identified' is meant that the plaintiff, by some conduct of his own, as by selecting the omnibus in which he was traveling, has acted so as to make the driver his agent, that would sound like a strange proposition, which could not be entirely sustained. But what I understand it to mean is that the plaintiff, for the purpose of the action, must be taken to be in the same position as the owner of the omnibus, or his driver." In a Wisconsin case,<sup>4</sup> the English rule is followed. In that case the vehicle was hired and driven by one person, and another, the plaintiff rode in it and was injured by the negligence of the defendant, that of the driver contributing to the injury. The court held that the negligence of the driver must be imputed to the plaintiff on the ground of agency. It says:

"When the agency of a person in control of a private conveyance is express, there is no difficulty in the rule. The contributory negligence of the servant will defeat the master's action for negligence against a third person; and it seems that there ought to be as little difficulty in the rule when the agency is implied only. One voluntarily in a private conveyance, voluntarily trusts his personal safety in the conveyance to the person in control of it. Voluntary entrance into a private conveyance adopts the conveyance, for the time being, as one's own, and assumes the risk of the skill and care of the person guiding it. *Pro hac vice*, the master of a private yacht, or the driver of a private carriage, is accepted as agent by every person voluntarily committing himself to it. \* \* \* There is a personal trust in such cases, which implies an agency."

The same rule has been followed in other

<sup>1</sup> 29 N. W. Rep., 317.

<sup>2</sup> *Thoroughgood v. Bryan*, 8 C. B. 115.

<sup>3</sup> *Armstrong v. Lancashire, etc. Co.*, L. R. 10 Exch. 47.

<sup>4</sup> *Prideaux v. City of Mineral Point*, 43 Wis. 513.

Wisconsin cases.<sup>5</sup> And in Michigan there is a like ruling.<sup>6</sup> And this it seems was a case similar to that in Minnesota in that it was a private carriage.

In a Pennsylvania case<sup>7</sup> the court follows the English rule as to its conclusion, yet repudiates the "identity" doctrine and bases its decision upon considerations of public policy.

The Supreme Court of Minnesota declines to follow these rulings, and puts its dissent upon what strikes us as a very sensible ground, that the whole theory of "identity" of a passenger with the driver of a vehicle, or that the driver is in any fair sense the servant or agent of the passenger, is, in plain language, a mere folly. "We do not refer to cases recognized as being exceptional, where parties stand in peculiar relations to each other; such as that of parent and child, guardian and ward. The theory of 'identity' which may be taken as the ground of the decision in *Thorogood v. Bryan*, and other English cases, is so vague and undefined, as applied to circumstances such as are here presented, where no relation like that of master and servant, or principal and agent actually exists, and where the plaintiff is not only without fault, so far as appears, but without authority, respecting the conduct of the driver, that it is difficult to understand what is meant by it; and the explanatory remarks of Baron Pollock, *supra*, do not solve the difficulty of reconciling such a theory with the principle of law which affords a remedy to one who, being himself without fault, is injured by the wrongful act of another. It is enough to say, that this theory of identity has little or no support in this country; that the decision in *Thorogood v. Bryan* has not escaped criticism in the English courts, and has been generally repudiated in America."

It certainly seems ridiculous to say, that a gentleman entering an omnibus and paying his fare is "identified" with the driver in any other sense than that of a common humanity, or that a lady, (as in the case under consideration,) by accepting a gentleman's invitation to ride with him in his carriage, makes him

her servant" or "agent" in any sense whatever. The employment of such words in such a connection, and for such a purpose is not only an abuse of legal language, but a perversion of legal principles. In this connection the learned editors of *Smith's Leading Cases* say:<sup>8</sup> "It is inconceivable that each set of passengers should by a fiction be identified with the coachman who drives them, so as to be restricted for remedy to one against their own driver or employee."

The Minnesota court is not without support in the stand which it has taken on this subject. In New York, in a case similar to that under consideration, a like conclusion was reached.<sup>9</sup> And in a later case in the same State,<sup>10</sup> the court explicitly denied the existence of a relation of agency under such circumstances, and in this was followed by a still later case.<sup>11</sup> The Supreme Court of the United States in a recent case,<sup>12</sup> held that the driver of a hired hack was not the servant of the passenger who had hired the vehicle, nor was his negligence imputable to the latter.

In New Jersey, there have been two cases sustaining the same view. One of these was the case of a passenger on a horse car who was injured by the concurrent negligence of the driver, and of the defendant;<sup>13</sup> in the other case the plaintiff was a passenger in a hired hack.<sup>14</sup> In both cases the doctrines of identity and agency were held inapplicable to cases in which a man merely pays a nickel or a quarter for a ride in a street car or a hack. In Ohio,<sup>15</sup> and in Illinois,<sup>16</sup> the courts have repudiated the doctrine of *Thorogood v. Bryan*,<sup>17</sup> and refused to sanction the doctrines of identity or agency.

Upon the whole, we think that the Supreme Court of Minnesota has done wisely and well, in refusing to recognize the authority of a line of decisions founded upon a modern fiction of law, dependant upon a glaring and

<sup>8</sup> 1 *Smith's Leading Cases*, 366.

<sup>9</sup> *Robinson v. New York Central, etc. Co.*, 66 N. Y. 11.

<sup>10</sup> *Dyer v. Erie, etc. Co.*, 71 N. Y. 228.

<sup>11</sup> *Masterson v. New York Central, etc. Co.*, 84 N. Y. 247.

<sup>12</sup> *Little v. Hackett*, 6 Sup. Ct. Rep. 391.

<sup>13</sup> *Bennett v. New Jersey, etc. Co.*, 36 N. J. Law, 225.

<sup>14</sup> *New York, etc. Co. v. Sternberger*, 20 Rep. 518 (1885).

<sup>15</sup> *Transfer Co. v. Kelly*, 36 Ohio St. 86.

<sup>16</sup> *Wabash, etc. Co. v. Shacklett*, 105 Ill. 364.

<sup>17</sup> *Supra*.

<sup>5</sup> *Honfe v. Fulton*, 29 Wis. 296; *Otis v. Janesville*, 47 Wis. 422.

<sup>6</sup> *Lake Shore, etc. Co. v. Miller*, 25 Mich. 274.

<sup>7</sup> *Lockhart v. Lietenthaler*, 46 Pa. St. 151.

fanciful perversion of a well defined legal relation, and usually operating to the hindrance of justice. The rule conflicts as well with common sense as with legal principle. To say that one who pays twenty-five cents to ride in an omnibus from a depot to a hotel is in any sense the "master" of the man who drives the vehicle, is simply and emphatically folly. A master is one who has the right to command; a servant is one whose duty is to obey, and neither command nor obedience is predicable of the relation between the parties. If the passenger orders the driver to go up A. street instead of B. street, he would probably be profanely snubbed for his impertinence, and to hold him responsible for the misdeeds of a man whom he cannot control, even in minor matters, is absurd as well as unjust.

#### JUDGMENTS AS EVIDENCE AGAINST THIRD PERSONS WHO ARE RESPONSIBLE OVER.

It is a general rule that a person who is responsible over to the defendant in an action at law for any loss or damage suffered by the latter in respect to the subject-matter of the suit, is concluded by a judgment recovered against the defendant without fraud or collusion, as to all the points necessarily determined by it, provided he had notice of the pendency of the suit and an opportunity to come in and make a defence.<sup>1</sup> Nor is this any relaxation of the rule that a judgment estoppel is binding only upon parties and privies. For the person so responsible, by being apprised of the action and by being granted an opportunity to interpose any defences which are available to him, and generally to controvert the adverse claim, is in effect made a party to the litigation, and can no longer be regarded in the light of a mere stranger.<sup>2</sup> And it is perfectly immaterial whether or not he does in fact participate in the defence of

the action. The two essentials are notice and opportunity to be heard. Given these, he stands in no better position than any defendant who neglects to interpose a meritorious defence; as to him the matter becomes *res adjudicata*.<sup>3</sup>

To apply these principles to a particular instance: where one who has conveyed land to another, with warranty of title, is vouched in by the latter, upon due and proper notice, to defend an action of ejectment brought by a third person against the warrantee for the recovery of the same land, the judgment in ejectment, if given for the stranger, is conclusive evidence, in a subsequent action by the covenantee against his grantor on the warranty of title, of the fact that the former has been evicted from his possession by a paramount title.<sup>4</sup> But still—on the principle that a judgment is conclusive only of the matters necessarily determined by it—there are certain defences open to the grantor, even in this case, when sued on his warranty of title; such, namely, as could not have been involved in the controversy between the tenant and the evictor, and such as are not necessarily inconsistent with that judgment. Thus he may show that his covenant was special, or that he made no covenant, or that the recovery was upon a title derived from the warrantee himself or in consequence of some fact occurring after the date of the covenant.<sup>5</sup>

The same rule applies where the warrantee is plaintiff in a suit for the recovery of the

<sup>3</sup> Love v. Gibson, 2 Fla. 598; Veazie v. Railroad, 49 Me. 119.

<sup>4</sup> Knapp v. Marlboro, 34 Vt. 235; Swenk v. Stout, 2 Yeates, 470; Collingwood v. Irwin, 3 Watts, 310; Turner v. Goodrich, 26 Vt. 708; Ives v. Niles, 5 Watts, 323; Miner v. Clark, 15 Wend. 425; Pitkin v. Leavitt, 13 Vt. 379; Wilson v. McElwee, 1 Strobh. 65; Hinds v. Allen, 34 Conn. 195; Hamilton v. Cutts, 4 Mass. 349; Kelly v. Church, 2 Hill, 105; Chapman v. Holmes, 5 Halst. 20; Morris v. Rowan, 2 Harr. (Del.) 307; King v. Kerr, 5 Ohio, 158; Jones v. Waggoner, 7 J. J. Mar. 144; Cox v. Strode, 4 Bibb. 4; Middleton v. Thompson, 1 Spears, 67; Wimberly v. Collier, 32 Ga. 13; St. Louis v. Bissell, 46 Mo. 157; Graham v. Tankersley, 15 Ala. 634; Boyd v. Whitfield, 19 Ark. 469; Wendel v. North, 24 Wis. 223; Chicago, etc. R. R. v. Northern Line Packet Co. 70 Ill. 221; Davenport v. Muir, 3 J. J. Mar. 310; Williams v. Leblanc, 14 La. An. 757; Harding v. Larkin, 41 Ill. 413; Chamberlain v. Preble, 11 Allen, 370; Harbin v. Roberts, 33 Ga. 45. A contrary rule, however, prevails in North Carolina; Wilder v. Ireland, 8 Jones, 83; Martin v. Cowles, 2 Dev. & B., 101.

<sup>5</sup> Chicago, etc. R. R. v. Northern Line Packet Co. 70 Ill. 221; Davenport v. Muir, 3 J. J. Mar. 310; Rawle on Cov. for Title, 209.

<sup>1</sup> Littleton v. Richardson, 34 N. H. 179; Salle v. Light, 4 Ala. 700; Mahaffy v. Lytle, 1 Watts, 314; Boston v. Worthington, 10 Gray, 496; Clark v. Carrington, 7 Cranch, 322; Hamilton v. Cutts, 4 Mass. 353; Bond v. Ward, 1 N. & McC. 201; Kip v. Brigham, 6 Johns. 158; Walker v. Ferrin, 4 Vt. 523; Tyree v. Magness, 1 Sneed, 276.

<sup>2</sup> Salle v. Light, 4 Ala. 700.

land. That is, where he brings ejectment against a person whom he finds in possession of the estate deeded to him by the warrantor, and gives the latter proper notice to join in the action and make good his title, and judgment passes against them, such judgment is conclusive evidence of a want of title in the grantor when the warrantee sues him on his covenant.<sup>6</sup> But the grantee of land is not bound by a judgment in a suit commenced after such grant, by his own grantor against his immediate grantor upon the covenants in his deed.<sup>7</sup> And where a grantor in a deed has once responded to a suit on his covenant of warranty, brought by a proper party, he is not liable to a second suit on the same covenant; and the judgment obtained against him in the first suit is admissible as evidence in the second.<sup>8</sup> Where the warrantor is not notified of the pendency of the suit against his grantee, or has no opportunity to interpose a defence, the judgment against the warrantee cannot be used as evidence, in a subsequent action on the covenants of the deed, to show the superior title of the party recovering it, though it is admissible for the purpose of proving the *fact* of eviction.<sup>9</sup> But this amounts, after all, to no more than saying that the judgment is competent evidence of its own existence.

When ejectment is brought against a tenant in possession of the land, and he gives due and legal notice to his landlord, and the landlord has an opportunity to come in and defend, the latter is bound by a judgment against the tenant.<sup>10</sup>

And even where the landlord receives no notice whatever of the action, and the stranger recovers judgment against the tenant, it is held, in Wisconsin, that the possession is adversely and completely changed by the judgment, and the landlord is so far bound by the judgment, notwithstanding his want

of notice, although he is not bound as to the title or future right of possession.<sup>11</sup> So a judgment in an action of ejectment cannot affect a person in possession of the premises when the suit is commenced unless he is made a party to the action.<sup>12</sup> But if a tenant of the defendant in such action has taken possession with actual notice of the pendency of the suit, he will be bound by the judgment as though a party.<sup>13</sup> And where the terre-tenant has actually appeared and had an opportunity to make a full defence, even though he may not have availed himself of it, he is concluded to every intent.<sup>14</sup>

The same rule applies to the case of a sale of personal property with express or implied warranty of title. In a suit for a breach of such warranty of title, the record of a judgment for the value of the property, in favor of a third person and against the vendee (if it appears that the question of title was directly involved, and that the recovery was not upon a title derived from the vendee himself), is conclusive evidence against the vendor that the property was recovered by title paramount, provided it be shown that the vendee had given the vendor legal notice of the pendency of the action against him.<sup>15</sup> On the same principle, where the assignor of a note warranted it free from set-off, and in a suit by the assignee against the maker, of which the assignor was notified, and in the prosecution of which he took part, there was a judgment for a set-off, it was held that in a subsequent action by the assignee against the assignor for deceit, that judgment was conclusive evidence of the set-off.<sup>16</sup> And, in the language of Kent, J.: "It can make no difference that there are intermediate purchasers, and that the suit is against the last one, if the question of title is the sole matter in controversy. All the in-

<sup>6</sup> Brown v. Taylor, 13 Vt. 631; Gragg v. Richardson, 25 Ga. 566; Pitkin v. Leavitt, 13 Vt. 379; White v. Williams, 13 Tex. 258; Farrell v. Alder, 8 Humph. 44.

<sup>7</sup> Winslow v. Grindal, 2 Me. 64.

<sup>8</sup> Vancourt v. Moore, 26 Mo. 92; Brady v. Spurek, 27 Ill. 478.

<sup>9</sup> Hardy v. Nelson, 27 Me. 525; Stephens v. Jack, 3 Yerg. 403; Tam v. Shaw, 10 Ind. 469.

<sup>10</sup> Chambers v. Lapsley, 7 Pa. St. 24; Ryers v. Rippey, 25 Wend. 432; Harvie v. Turner, 46 Mo. 444; Valentine v. Mahoney, 37 Cal. 389; Chant v. Reynolds, 49 Cal. 213; Van Alstine v. McCarty, 51 Barb. 326.

<sup>11</sup> Striddle v. Saroni, 21 Wis. 173.

<sup>12</sup> Fogarty v. Sparks, 22 Cal. 142; Bradley v. McDaniel, 3 Jones (N. C.), 128.

<sup>13</sup> Fogarty v. Sparks, *supra*.

<sup>14</sup> Himes v. Jacobs, 1 Pen. & W. 152.

<sup>15</sup> Marlatt v. Clary, 20 Ark. 251; Salle v. Light, 4 Ala. 700; Thurston v. Spratt, 52 Me. 204; Boyd v. Whitfield, 19 Ark. 447; Brown v. McMullen, 1 Hill (S. C.), 29; Barney v. Dewey, 13 Johns. 225; Pickett v. Ford, 4 How. (Miss.), 246; Blasdale v. Babcock, 1 Johns. 517.

<sup>16</sup> Walker v. Ferrin, 4 Vt. 523; and see Tyree v. Magness, 1 Sneed, 278; Morgan v. Simmons, 3 J. J. Mar. 611.

dividuals who have sold the property are alike warrantors, and can as well defend the title in the suit against the last purchaser as in a suit against themselves, if they have notice."<sup>17</sup>

An obligation to indemnify upon notice that suit has been brought, is also an obligation to defend the suit or to abide the consequences of a judgment, and the judgment will bind the indemnitor when the latter is notified to defend and fails to do so.<sup>18</sup> The most familiar example of this species of responsibility is the case where the plaintiff in an execution gives the sheriff a bond conditioned to hold him harmless for selling property levied on under the execution and claimed by a stranger, and where the sale is made, and the real owner then recovers judgment against the officer for the property or its value. Under these circumstances, the judgment against the sheriff will be competent evidence, in a subsequent action by him against the indemnitor, that the plaintiff in the former suit has asserted his claim to the property in question in due form of law, and that what the sheriff has paid he was compelled to pay by legal proceedings; but it will not be evidence that the claimant against the sheriff, was, in fact, the real owner of the property and entitled to its possession, unless the indemnitor had notice of the suit and an opportunity to defend.<sup>19</sup> But here, again, we find certain defences open to the person responsible over which were not included in the grounds of the former judgment, or are not inconsistent with it. Thus the indemnitor, though notified of the action against the sheriff and participating in its defence, will not be estopped to show that the verdict against the officer was rendered on account of his illegal conduct subsequent to the attachment of the property, or on account of his proceedings under other writs than that in which the indemnitor was plaintiff.<sup>20</sup>

Another class of cases which furnish frequent opportunity for the application of the rule we are now considering, is that where an individual is liable over to a municipal corporation for damages which the latter has been

compelled to pay in consequence of the wrongful act or default of the former. Thus, where judgment is recovered against a town for injuries caused by a defective highway, and a certain railroad corporation is responsible over to the municipality for the damages so recovered, by reason of the fact that the defect in the highway was caused by the alteration thereof by the railway, the company, if notified of the pendency of the action and requested to assume the defence, are bound by the judgment, and it is conclusive upon them as to the cause of the injury and the extent of the damages, whether they appear in the case or not.<sup>21</sup> Such is also the case where a person who places an obstruction in the public road is, by statute, liable over to the town for damages recovered by a traveller who was injured by such obstruction.<sup>22</sup> And in the case of *Robbins v. Chicago*,<sup>23</sup> it was held that it is not necessary that express notice should have been given to the party secondarily liable to defend the suit against the municipal corporation, in order to make the judgment in such suit conclusive upon him; it is sufficient if he *knew* that the suit was pending, and could have defended it, Clifford, J., saying: "The legal presumption is that he knew that he was answerable over to the corporation, and if so, it must also be presumed that he knew he had a right to defend the suit." In *Churchill v. Holt*,<sup>24</sup> it appeared that A. was the occupant of a building connected with which there was a hatchway in the street leading into the basement. The hatchway was once left open and unguarded, and M., a passenger in the street, fell into it and was injured. M. sued A. for damages and recovered a judgment, which A. paid. A. then sued B. for indemnity, alleging that the dangerous condition of the hatchway, on that occasion, was due to the negligent act of B.'s servant. On this state of facts it was held that the judgment in the suit of M. against the plaintiff was not conclusive against his right to maintain this action, Morton, J., saying: "Under the pleadings in that suit, the judgment may have been rendered on the

<sup>17</sup> *Kent, J.*, in *Thurston v. Spratt*, 52 Me. 204.

<sup>18</sup> *Troy v. Troy*, etc. R. R. 3 Lans. 270; *Kip v. Brigham*, 6 Johns. 158.

<sup>19</sup> *Burrill v. West*, 2 N. H. 190.

<sup>20</sup> *Boynton v. Morrill*, 111 Mass. 4.

<sup>21</sup> *Veazie v. Railroad*, 49 Me. 119; *Portland v. Richardson*, 54 Me. 46.

<sup>22</sup> *Littleton v. Richardson*, 34 N. H. 179.

<sup>23</sup> 4 Wall. 657.

<sup>24</sup> 127 Mass. 165.

ground that the plaintiffs were liable as occupants of the building, without any regard to the question whether they or a stranger to the suit removed the cover, or negligently left it unguarded. It conclusively shows that they were guilty of negligence in law as to the person injured, but it does not show that they were *participes criminis* with the defendants, and is not inconsistent with their right to maintain this action."

On a principle closely allied to those already discussed, it is held that a person who attends to the trial of a cause, not as a party, but upon notice by the defendant, on account of a liability of his, the amount of which will be affected by the judgment, may give evidence to lessen or defeat a recovery; and if he neglects to do so, he will not afterwards be permitted to give such evidence in an action directly against himself by the defendant in the first suit.<sup>25</sup>

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<sup>25</sup> *Mehaffy v. Lytle*, 1 Watts, 314.

#### LORD CHIEF JUSTICE COLERIDGE ON THE HOUSE OF LORDS.

At the Cutler's Feast, Lord Coleridge, C. J., responding to the toast of the "Houses of Parliament," said: "I thank you heartily for the gracious and cordial reception which you have been pleased to give to my name. But why I have been selected on the present occasion to return thanks for the toast which the Master Cutler has assigned to me, passes my imagination to conceive. I have always understood that the House of Lords represents, or is supposed to represent, what is called the principle of hereditary legislation. Now, what exactly that principle is, I will confess to you that from a very early period of my life I have never been able to comprehend, unless, indeed, it does rise to the dignity of a principle, that persons should be intrusted with the lawful and sacred power of making laws for one of the greatest and most magnificent empires upon which the sun has ever shone, not only when nobody knows that they are fit for it, but when everybody oftentimes knows that

they are perfectly unfit for it. But whatever the principle may mean I am no example of it. For in this single respect I am like Burke. I was not, as he said of himself: "Swathed and dandled into a legislator." I did not inherit the peerage, and I have gathered that a large section of the constituency of this great town of Sheffield is prepared to abolish the House of Lords, and I suppose me with it. Furthermore, as during the thirteen years which have passed away since I first entered into that ancient and august assembly I cannot remember one single solitary occasion upon which upon any party and political question I have had the good fortune to vote in the majority in that House; and as for five years before that time I was the law officer to a Government which had not the good fortune to agree with the majority in that House either, I cannot be expected in candor to speak with fanatical or even enthusiastic admiration of the course which their lordships have thought fit to pursue in the last twenty years. But I am told that politics are unknown in these walls. I believe it because I am told it. I believe it in faith. Faith is the substance of things hoped for; faith is the evidence of things not seen; and therefore I face the situation, and I am to return thanks for a most ancient and venerable assembly of which I am a very recent and a very obscure member. What can I say? Well, one thing I can say with perfect truth. In these days of change and flux, when the great wave of popular opinion is ever heaving and never continuing in one state, it is a comfort to some minds to be able to contemplate something fixed, immovable, unchanged, unaffected by the shock of circumstances or the lapse of time, which, braving the respectful, sometimes the disrespectful, curiosity of the nineteenth century, stands with exactly the same coolness and courage with which it confronted the inquiring reverence of the thirteenth and fourteenth centuries. It is certain that in that time empires have risen and have fallen; dynasties have waxed and waned in this country; religion has been changed more than once; one king has lost his head upon the scaffold, another been dethroned and banished by Act of Parliament; the science of political economy has been born, and from all I can learn seems about to die. The

franchise has been revolutionised, the House of Commons has been reformed again and again, and almost every municipal institution in the country has been either created or at all events recreated. Two institutions, and only two, remain as they were 500 or 600 years ago—the House of Lords and the Corporation of London. Alas, alas, for the instability of human affairs!—the Lord Mayor himself has been nibbled at; and the House of Lords has been told by him whom I follow Sir Michael Hicks-Beach in calling the most powerful statesman of the age that he is going to think three times before he abolishes it. It is pretty certain that, if not to him, at any rate to some one sooner or later will go forth that mandate — “mandate” is my noble friend’s word, and I take it with great satisfaction — that mandate to which all politicians of all sides bow down, to subject the great assembly for which I am returning thanks to that process of inquiry and of subsequent change which it does seem that every human institution of this country in this century is doomed to undergo. I have not disguised—why should I disguise?—that I am of opinion, with thirteen years experience of its working, and of the renewed flow of things that goes on all around us, that it cannot be expected that the House of Lords, any more than any other institution in this country, should be saved forever from change and reconstruction. But I will be equally frank, and I would say that I do hope that it will be dealt with in the way of change and reconstruction, and not by way of abolition. In every free country, I believe—I am sure in most—it is found necessary, or it is believed to be necessary, to have a second Chamber in the legislative machinery of the State, and I am certain that in the English House of Lords there is the most admirable material for the reconstruction of the Chamber. The English House of Lords never did want, and does not now want, grand commanding ability. A debate in which—to go no further than four names—a debate in which the Duke of Argyll, Lord Salisbury, and Lord Selborne, and the Bishop of Peterborough mingled is a thing, let me tell you, worth a man’s while to go many miles to listen to; and we find that still to great men of all sorts, to great contractors, to

great brewers, to great bankers, to great men of commerce, to great soldiers and sailors, and may I say, excluding myself, great lawyers, not only to men who are remarkable for nothing but the number of acres and the quantity of stock or consols they may own, the position of a seat in the House of Lords is still an object of ambition; and I would undertake to say, speaking with all reverence in presence of some of the foremost men in the House of Commons, that a man might now take up fifty men out of the House of Lords who, man for man, would be the equals in ability, with perhaps one enormous exception that will occur to every one, on whichever side of politics he may sit—absolute equals of any fifty men in the House of Commons. It is not in eloquence, it is not in learning and ability, it is not in knowledge, it is not in high character and noble ambition—nay, it is not in a certain sense in currency with affairs that the House of Lords is deficient. The House of Lords has lost its weight in the country, if it has lost it, from other causes—because, unfortunately, a vast majority of the peers never come near the House of Lords at all, and never take any part in its business; because those who do take part come there because they choose to come, and are responsible to no one but themselves, and it is impossible with all their ability that they should not to some extent lose touch of the people and get out of harmony with the times. But let this be altered. Let men sit in the House of Lords because some one thinks them fit to sit there; let them be sent there by some system of choice, some mode of election—I do not say necessarily directly from the people, but, speaking roughly and offhand, and, I pray you remember, after dinner, by some system as is so successful in the American Senate, and I will venture to say that the English House of Lords would be not only the most ancient, the most venerable, the most illustrious body, but one of the most powerful and the most popular legislative assemblies which the world has ever seen.

**ACTION AGAINST RAILROAD COMPANY  
BY ADMINISTRATOR OF EMPLOYEE, ON  
ACCOUNT OF DEATH FROM EXPLOSION  
OF LOCOMOTIVE BOILER.**

**THE LOUISVILLE & NASHVILLE RAILROAD CO.  
V. ALLEN.**

*Supreme Court of Alabama, June, 1886.*

1. *Railroad Company—Neither Warrants nor Insures Against Accidents.*—A railroad company is not required to warrant the perfection of its machinery or appliances, nor to insure its employees against injury from boiler explosions, or other like accidents; it is only bound to use due care and diligence—that is, the care and diligence which a man of ordinary prudence, engaged in a like business, would exercise for his own protection and the protection of his property: first, to furnish a safe and suitable engine, and then to keep it in that condition.

2. *Negligence.—When Question for Jury and When for Court.*—In cases of doubt—when the facts are disputed, or when different minds may reasonably draw different conclusions from the same undisputed facts—the question of negligence is a question of fact for the determination of the jury; but, when the facts are undisputed, and the inference to be drawn from them is clear and certain, it is a question of law for the decision of the court.

3. *Latent Defects—Not Liable for Injuries from Unless Negligent.*—For injuries suffered from the explosion of an engine, caused by a latent defect, which was not visible or capable of discovery by the closest inspection from within or without, and which was in fact not known to the defendant or any of its servants, the railroad company is not liable to an action, unless it was guilty of negligence in failing to discover the defects.

4. *Negligence—Of Fellow-Servants—Special Statute.*—If the injury occurred prior to the passage of the Act approved February 15, 1885 (Sess. Acts, 1884-85, p. 115), changing the rule as to the liability of the employer to one of his servants for injuries resulting from the negligence of other fellow-servants, the fact that a circumstance pointing to the defect was discovered a few hours before the explosion, by other workmen, who failed to report it, would not render the corporation or employer liable.

5. *Negligence—Onus of Proof—Rule When Employee and When Passenger.*—In an action by an employee or servant for a railroad company, to recover damages for injuries caused by the explosion of an engine, the onus of proving negligence is on him, and it is not enough to prove the fact of injury from the explosion; but the rule is different when the action is brought by a passenger.

6. *Railroad Company—Rule as to Adoption of New Inventions.*—A railroad company is not required by its duty to its employees and servants to adopt every new invention or appliance which may be useful in its business, and which may serve to diminish the risks to life, limb or property, incident to its service; it is sufficient to adopt such as are ordinarily used by prudently conducted roads engaged in like business, and surrounded by like circumstances.

7. *Negligence—Tests to Discover Latent Defects.*—The application of the steam test for boilers being shown to be neither practicable nor approved, on ac-

count of its danger; and the hydraulic test, as shown by the evidence, being extraordinary and rarely used, except when engines are first used, or fail to work well, or when they are overhauled periodically; the failure to apply either or both of these tests to the defective boiler is not negligence.

8. *Negligence—When not Imputable for Failure to Apply Tests.*—Nor can negligence be imputed to the company, on account of the failure to apply the hydraulic test to the engine when it was last overhauled at the shops, ten months before the explosion, when the evidence shows that the defect had not existed longer than from two to six months.

Appeal from Montgomery Circuit Court.

Tried before Hon. John Hubbard.

*Thos. G. Jones, and J. M. Falkner, counsel for appellant, Watts & Son, contra.*

The appellee, Flora A. Allen, administratrix of Daniel M. Allen, deceased, brought this action against the appellant, to recover damages for the killing of her intestate, while in the service of the appellant, by the explosion of the boiler of one of its engines. There was judgment in her favor in the court below for \$10,000.00.

The evidence was voluminous for and against the defendant, and it is unnecessary to set it out. Numerous exceptions were reserved, and the chief of which was the refusal of the court below to charge the jury, at the request of defendant, that "if the jury believe the evidence they must find for the defendant."

SOMERVILLE, J., delivered the opinion of the court:

The intestate of the plaintiff was accidentally killed in December, 1883, by the explosion of the boiler of a steam-engine, he being at the time in the employment of the defendant railroad company, and this action is brought to recover damages of the company for its alleged negligence as the proximate cause of the injury.

The whole controversy is, in our judgment, reduced to one single issue—that of negligence *vel non* on the part of the railroad company.

The defect in the boiler, which was the cause of the explosion, was a latent or secret one, not visible or capable of discovery by the closest inspection from within or without—being a flaw or crack in the upper part of one of the boiler sheets, between two plates where they overlapped. Neither the removal of the flues, nor the stripping of the outside of the boiler of the jacket and lagging, would have discovered it. Nor could it have been discovered by hammering on the boiler or from the sound of the hammering. It is shown that both the outer and inner sheets of the boiler were in apparently good condition. The existence of the fact was, for those reasons, unknown in fact to the defendant or any of its servants or employees.

It is insisted, however, that the railroad company was guilty of negligence in failing to keep the engine in proper repair, or rather in failing to discover the flaw or defect, which was the cause of the explosion, and upon the discovery of which

the duty to repair would depend; that there was evidence tending to prove this negligence, and that the question was one for the determination of the jury.

There was no absolute duty resting on the railroad to furnish a safe engine to be used in its service. It was not required to warrant the perfection of its machinery or appliances, or to insure its employes against injury from boiler explosions or other like accidents. Its duty to employes was only to use due care and diligence, first—to furnish a suitable and safe engine and then like care and diligence to keep it in that condition. And by due care and diligence we mean "the care and diligence which a man of ordinary prudence, engaged in a like business, would exercise for his own protection, and the protection of his property,"—a care which must be reasonably commensurate with the nature and hazards attending the particular business, *Mobile & Ohio R. R. Co. v. Thomas*, 42 Ala. 672; 713; *Smoot v. M. & M. R. Co.* 67 Ala. 18; *Pierce on Railroads*, 370-373.

In this case there neither can be, nor is, any negligence imputed in failing to furnish a good and safe engine originally. This is shown to have been done. The negligence charged is in failing to keep the engine in a safe condition. This charge can be sustained only by showing that there was negligence in failing to discover the defect in the boiler, which is supposed to have existed not longer than from two to six months previous to the date of the explosion.

The question is then resolved into the inquiry. Did the defendant use due care and diligence to discover the latent flaw or crack in the boiler which was the cause of the accident?

The question of negligence is one of fact for the determination of the jury in cases of doubt, either where the facts are disputed, or where different minds may reasonably draw different inferences or conclusions. It is a question of law, however, to be decided by the court, where the facts are undisputed, and the inference to be drawn from them is clear and uncertain. *City Council of Montgomery v. Wright*, 72 Ala. 411. The court will accordingly give a general charge, on the evidence, when requested, where the evidence bearing on the question of negligence *vel non* is such as that the court would feel authorized to sustain a demurrer to it. *Smoot v. the M. & M. Railway Co.* 67 Ala. 13.

The evidence contained in the bill of exceptions tends to show but two grounds upon which it can be claimed with any show of reason, that the defendant was negligent. The first is, the fact that three of the employees of the defendant, the engineer who carried the engine over to the yard, the night hostler whose business it was to look after engines when they come in at night, and the fireman on the engine, had each, a few hours before the explosion, noticed a small leak near the sand box from which there escaped a small amount of steam, which was supposed to be smoke com-

ing out of the side of the engine near the dome or sand box. It was no unusual thing for smoke to thus emanate from the lagging or jacket of the engine, and in such cases it could be stopped by pouring a few buckets of water upon it, which, in this case, Hicks, the night hostler, did successfully, and no report was made of the incident. We dispose of this first suggestion of negligence before proceeding to consider the second and more important one. If we admit that the several employees mentioned were negligent in failing to discern the difference between smoke and steam, and in not reporting this discovery to the proper superior officers of the company, the defendant would not be liable for this negligence of co-employees, or fellow-servants, in the same general business.

It was the settled law in this State, prior to the act of February 12, 1885, establishing by statute a contrary rule, that the employer is not liable in damages for an injury suffered by a fellow-servant by reason of the faults or negligence of another fellow-servant or co-employee, in the same general business, unless such employer was chargeable with want of due care in having employed incompetent or unskillful servants in the particular business in which the injury was received; *M. & M. Ry. Co. v. Smith*, 59 Ala. 248; *M. & O. R. Co. v. Thomas*, 42 Ala. 672. There is nothing in the record which would tend to challenge the skill, or impugn the competency of the engineer or other employees to whom we have referred. They were all very obviously fellow-servants of the plaintiff's intestate who was injured by their alleged negligence, and, under the rule above stated, no liability would rest on the defendant company for the want of care of their co-employees in this matter.

We now come to the second phase of the alleged negligence of the company in failing to use due care by resorting to proper tests for discovering the flaw in the boiler.

It has been said that this defect was latent, and very manifestly could not have been detected by the most careful inspection. It is shown, moreover, that inspections were made of this and other engines at stated times, and with sufficient frequency, and by competent officials, and they failed to detect the defect. No negligence can be based, therefore, upon the failure to discover it by inspection merely, because, we repeat, it was latent and not so discoverable.

The burden of proof in this case is on the plaintiff to prove negligence, and this is not shifted by proving only the fact of injury from the explosion of the boiler. Such is the rule where an employee or servant sues, although a different principle is held to prevail where an injury is received by a passenger on a railroad in consequence of a defect in any of its machinery or appliances. *M. & M. R. Co. v. Thomas*, 42 Ala. 672, 715; *Pierce on Railroads*, 382-383; *Illinois Central R. Co. v. Housk*, 72 Ill. 285.

The only two tests suggested are those of steam and water. The first, by reason of its danger, is shown rarely, if ever, to have been resorted to by railroads, or other companies using steam-boilers. It is neither practicable nor approved, because it serves to bring about the very thing it was intended to prevent. The one question then is, whether the company was guilty of a want of ordinary care by failing to resort to the water or hydraulic test, which consisted in applying a certain number of pounds pressure of water to the boiler by the aid of a suitable pump. It is testified by experts that such tests, when made, are liable to strain the fiber of the iron and impair the strength of the boiler, and thus in themselves tend to increase the hazard of explosion. The application of the hydraulic test, moreover, involved the stripping of the lagging on the outside of the boiler, and the removal of the flues from the boiler, a taking to pieces of the boiler, so to speak.

We conceive the correct and just rule to be, that a railroad company's duty to its employees does not require it to adopt every new invention or appliance useful in its business, although it may serve to diminish risks to life, limb or property, incident to its services. It is sufficient fulfillment of duty to adopt such as are ordinarily in use by prudently conducted roads engaged in like businesses, and surrounded by like circumstances. Nor can it be exacted of such common carriers, that they should adopt extraordinary tests for discovering defects in machinery, which are not approved, practicable and customary. They are not responsible for accidents from defects not discoverable by tests which are both practicable and usual, and such as persons of ordinary prudence, engaged in like business, are accustomed to adopt under similar circumstances. The law is reasonable and does not require such excess of caution, as to embarrass or render impracticable the operation of the road, although the degree of care and vigilance required is not to be made dependent upon the pecuniary condition of the company so as to expand or contract with the fluctuations of its finances. *Pierce on Railroads*, 273, 274; *Lake Shore R. Co. v. McCormick*, 74 Ind. 440; *Grand Rapids, etc. R. Co. v. Huntly*, 38 Mich. 537; *Smoot v. M. & M. R. Co.*, 67 Ala. 18; *De Craff v. New York Central, etc. Railroad*, 76 N. Y. 130.

The evidence shows without conflict that the hydraulic test, as applicable to steam-boilers, was an extraordinary and rare test, not in customary or common use by either railroads, or other persons, except when engines were first manufactured to be put on the road, unless they failed to work well; or except when engines were overhauled periodically in the workshops of the company.

It may be said that the engine here in question was repaired or overhauled in February, 1883, and that this was negligence. The answer to this suggestion is furnished by the record. This repairing was done about ten months prior to the

happening of the accident from which the injury occurred to the deceased, and there is no evidence tending to prove that the defect in the boiler existed at that time. On the contrary, the testimony shows, that it could not have existed longer than from two to six months. The failure of the company, therefore, to apply the hydraulic test ten months previous, if a negligence at all, had no proximate causal connection with the injury. The use of the test would not have discovered the defect.

Our conclusion is that the deceased was injured by a mere misfortune or accident, which he assumed as a risk of the business in which he was employed, and which was in no wise attributable to the negligence of the defendant or its servants. The evidence showing these facts clearly and without conflict, the court erred in refusing to give the general charge to find for defendant.

Reversed and remanded.

CLOPTON, J., not sitting.

**NOTE.—Railroad Company—Warranty against Accident.**—An employer may always be held liable for injuries arising from his own fault or negligence.<sup>1</sup> The law imposes upon him the duty of seeing that the servant shall be under no risk because of inadequate or defective machinery to the extent of reasonable care and prudence, no matter whether the defects are in the original construction of the machine or arise from want of repair.<sup>2</sup>

The relationship of employer to employee does not involve a guaranty by the employer of the employees safety.<sup>3</sup> Neither is there an implied warranty that the machinery furnished shall be sound or fit for service nor that the servant shall not be exposed to ordinary risks.<sup>4</sup>

The master does not guarantee the soundness of the machinery nor insure the servant against accidents; and if the latter suffers injury from latent defects unknown to the master and not discoverable in the exercise of ordinary diligence the master is not liable.<sup>5</sup>

**Negligence.—When Question for Jury and when for Court.**—The question of negligence is one of fact except in some cases when it becomes a question of law and the case may be taken from the jury. It has been held in some cases that when the facts are undisputed or conclusively proved the question of negligence is one

<sup>1</sup> *Ryan v. Fowler*, 24 N. Y. 410; *Keegan v. West. R. Co.* 8 Id. 175; *Gilman v. Eastern R. Co.* 10 Allen, 236; *Snow v. Housatonic R. Co.* 8 Id. 441; *Marshall v. Stewart*, 33 E. L. & Eq. 1; *Wright v. N. Y. C. R. Co.* 25 N. Y. 572; *Noyes v. Smith*, 28 Vt. 59; *Faulkner v. Erie R. Co.* 49 Barb. 324.

<sup>2</sup> *King v. N. Y. Cent. R.* 4 Hun. 769; *Warner v. Erie R. Co.* 89 N. Y. 468; *Laning v. N. Y. Cent. R. Co.* 49 Id. 521; *Coughtry v. Woollen Co.* 56 Id. 126; *Wright v. N. Y. C. R. Co. supra*; *Gibson v. Erie R. Co.* 3 Hun. 31.

<sup>3</sup> *Hadley v. Baxendale*, 6 H. & N. 443; *Priestly v. Fowler*, 3 M. & W. 1; *Wright v. N. Y. Cent., supra*; *Tinney v. B. & A. R. Co.* 62 Barb. 218.

<sup>4</sup> *Heyer v. Salisbury*, 7 Brad. (Ill. App.) 93.

<sup>5</sup> *Tiefield v. Northern R. Co.* 42 N. H. 225; *Ormond v. Holland*, El. Bl. & El. 102; *L. R. & T. S. R. Co. v. Duffey*, 35 Ark. 602; *Galveston, etc. R. Co. v. Delahunty*, 53 Tex. 206; *Flynn v. Beebe*, 98 Mass. 575; *Ladd v. New Bedford R. Co.* 119 Id. 412; *Gibson v. Pac. R. Co.* 46 Mo.

of law.<sup>6</sup> But in the *McLain v. Van Zandt*,<sup>7</sup> a seemingly better view was adopted. It was there held, that in order to justify the court in taking the case from the jury, the facts of the case should not only be undisputed but the conclusion to be drawn from those facts indisputable whether the facts be disputed or not, some courts have held that if different minds may draw different conclusions from them, the case should properly be submitted to the jury.<sup>8</sup>

The rule has sometimes been laid down that if there be any evidence tending to prove a fact, the case should be submitted to the jury.<sup>9</sup>

The rule in England however, is laid down in *Toomey v. London etc. R. Co.*<sup>10</sup> in the following language. "A scintilla of evidence or a mere surmise that there may have been negligence on the part of the defendants clearly would not justify the judge in leaving the case to the jury; there must be evidence upon which they might reasonably and properly conclude that there was negligence." This rule should be universally adopted in this country.<sup>11</sup>

**Negligence of Fellow-Servant.**—The rule that the employee cannot recover of his employer for injuries received by reason of the negligence of a fellow-servant, in the same general employment, is well settled.

**Burden of Proof.**—In an action for injuries by an employee against his employer resulting from his alleged neglect, the burden of proof is on the employee.<sup>12</sup> Where the injury is caused by defective machinery or the negligence of agents or both, the plaintiffs must also show that the defendant did not employ competent servants or sound machinery<sup>13</sup> or that he knew of the defect or incompetency or could have known it by using diligence.<sup>14</sup>

In *Rose v. Stephens & Condit Transp. Co.*,<sup>15</sup> however, it was decided that the explosion of a boiler was evidence of negligence whether there was any relation

between the owner of the boiler and the person injured, or not. The presumption originates from the nature of the act and not the relation of the parties.

**As to Adoption of New Inventions.**—The master is not, under all circumstances, bound to discard one appliance and replace it with something which is safer. While there may be a moral obligation on his part to provide the latest improvements, still he is not legally bound to do so. He is only required to see that which he does employ, is safe and suitable for the purpose for which it is used.<sup>16</sup> Some courts have gone so far as to hold that as between himself and the employee the master has the right to keep a machine in use after it has become old and defective, provided its defects do not expose the servant to some latent danger.<sup>17</sup> But in *Indiana*, "It is negligence to use cars dangerous in their construction when there are others to be used which are not dangerous. Railroad companies are bound to procure the best; otherwise they must be held responsible." Judge Thompson in his very valuable work on negligence, lays down this rule. "The obligation of the master is one, not only of care, but of good faith. The obligation is discharged when the master fairly apprises the servant—the latter being *sui juris* of the nature and extent of the risks which he undertakes."<sup>18</sup>

The cases where the failure to make tests has been alleged as negligence are few.<sup>19</sup>

Detroit, Mich.

A. G. McKean.

<sup>6</sup> *Gagg v. Vetter*, 41 Ind. 228; *Louisville Canal Co. v. Murphy*, 9 Bush. 522; *Costello v. Landwehr*, 28 Wis. 522; *Grigsby v. Chappel*, 5 Rich. L. 446; *Pittsburg, etc. R. Co. v. Evans*, 53 Pa. St. 250; *Fleming v. West. Pac. R. Co.* 49 Cal. 253; *Van Lien v. Scoville Man. Co.* 4 Daly, 554; *Foot v. Wiswall*, 14 Johns. 304; *Things v. Cent. Park R. Co.* 7 Robt. 616; *Biles v. Holmes*, 11 Fred. 16; *Dascomb v. Bufalo, etc. R. Co.* 27 Barb. 221; *Dublin, etc. R. Co. v. Slatery*, 3 App. Cas. 1155, per Lord Blackburn.

<sup>7</sup> *Jones & Sp.* 347.

<sup>8</sup> *Jenkins v. Little Miami R. Co.* 2 Disney, 49; *Stoddard v. St. Louis R. Co.* 65 Mo. 514; *Norton v. Ittner*, 56 Mo. 351; *Wyatt v. Citizens R. Co.* 55 Id. 485; *Railroad Co. v. Stont*, 17 Wall. 657; *Fernandez v. Sacramento City R. Co.* 4 Cent. Law J. 82; *Detroit, etc. R. Co. v. Van Steinburg*, 17 Mich. 90; *State v. Railroad*, 52 N. H. 529; *Gaynor v. Old Colony, etc. R. Co.* 100 Mass. 208; *McGrath v. Hudson River R. Co.* 32 Barb. 144; *Bridges v. N. London R. Co.* L. R. 7 H. L. 215; *Beers v. Housatonic R. Co.* 19 Conn. 566; *Vinton v. Schwab*, 32 Vt. 612; *Penna. Canal Co. v. Bentley*, 66 Pa. St. 30.

<sup>9</sup> *Cumberland, etc. Iron Co. v. Scolly*, 27 Md. 539; *Flori v. St. Louis*, 3 Mo. App. 231.

<sup>10</sup> 3 C. B. (N. S.) 146, 150. This may be regarded as the settled law of England. See *Cornman v. Eastern Counties R. Co.* 4 H. & N. 781, 786, *Bramwell B.*; *Jackson v. Metropolitan R. Co.* 3 App. Cas. 193; *Ryder v. Wombwell*, L. R. 4 Exch. 33; *Jewell v. Parr*, 13 C. B. 916.

<sup>11</sup> *Brantien v. Portland Co.* 48 Me. 291; *Greenleaf v. Illinois R. Co.* 29 Iowa, 22; *Lehman v. Brooklyn*, 29 Barb. 234.

<sup>12</sup> *Wharton Neg.* § 428; *Shear & Red. Neg.* § 99; *II Thom. Neg.* 1053; *Louisville & N. R. Co.* 84 Ind. 50; *Way v. Ill. Cent. R. Co.* 40 Iowa, 341.

<sup>13</sup> *Hanrathy v. N. C. R. Co.* 46 Md. 280; See *Johnson v. Armour*, 18 Fed. Rep. 490.

<sup>14</sup> *Columbus, etc. R. Co. v. Troesch*, 68 Ill. 545.

<sup>15</sup> 11 Fed. Rep. 438.

<sup>16</sup> *Ft. Wayne R. Co. v. Gildersleve*, 33 Mich. 133; *Botsford v. Mich. etc. R. Co.* Id. 256; *Stack v. Patterson*, 6 Phila. 225; *West. R. Co. v. Bishop*, 50 Ga. 465; *Wonderly v. Baltimore, etc. R. Co.* 32 Md. 411; *Jones v. Granite Mills Co.* 7 Rep. 146; *Piper v. New York, etc. R. Co.* 1 N. Y. (S. C.) 290; *Sabbers v. Delaware Canal Co.* 3 Hun. 338.

<sup>17</sup> *Hayden v. Smithville Mfg. Co.* 29 Conn. 548; *Kelly v. Silver Spring Co.* 7 Reporter, 60. *St. Louis, etc. R. Co. v. Valerius*, 56 Ind. 511; *Oiting Toledo, etc. R. Co. v. Wand*, 48 Id. 476; *Smith v. N. Y. etc. R. Co.* 19 N. Y. 127; *Hegeman v. Western R. Corp.* 13 Id. 9.

<sup>18</sup> *Thomp. Neg.* p. 983; *Citing Dewitt v. Pacific R. R.* 50 Mo. 102; *Dynew v. Leach*, 26 L. J. (Exch.) 221; *Wonderly v. Baltimore, etc. R. Co.* *supra*.

<sup>19</sup> *Smoot v. M. & M. R. Co.* 67 Ala. 13; *Nashville, etc. R. Co. v. Jones*, 9 Heisk. 27; *Hegeman v. West. R. Co.* 16 Barb. 358; *Alden v. N. Y. C. R. Co.* 26 N. Y. 102.

## CONSTITUTIONAL LAW—JURISDICTION OF CRIMES—INDIANS—TRIBAL RELATIONS—AUTHORITY OF CONGRESS—STATE AUTHORITY.

### UNITED STATES V. KAGAMA.\*

*Supreme Court of the United States, May 10, 1886.*

1. *Indians—Jurisdiction of Crimes—Constitutional Law.*—The ninth section of the Indian Appropriation Act of March 3, 1885 (Session Acts, p. 385), is valid and constitutional in both its branches, namely, that which gives jurisdiction to the courts of the territories of the crimes named committed by Indians within the territories, and that which gives jurisdiction in like cases to the courts of the United States for the same crimes committed on an Indian reservation within a State of the Union.

2. —. —. *Crimes Enumerated.*—The crimes

\*S. C. The Reporter, Vol. 22, p. 449.

mentioned in the act are murder, manslaughter, rape, assault with intent to kill, arson, burglary, and larceny.

3. ———. *Authority of Congress.*—While the government of the United States has recognized in the Indian tribes heretofore a state of semi-independence and pupillage, it has the right and authority, instead of controlling them by treaties, to govern them by acts of Congress, because they are within the geographical limit of the United States, and are necessarily subject to the laws which Congress may enact for their protection and for the protection of the people with whom they come in contact.

4. ———. *State Authority—Tribal Relations.*—The States have no such power over them as long as they maintain their tribal relations. They owe no allegiance to a State within which their reservation may be established, and the States gives them no protection.

On a certificate of division in the opinion between the judges of the Circuit Court of the United States for the District of California.

The facts are to be found in the opinion.

The Attorney General, Mr. *Garland*, and the Solicitor General Mr. *Goode*, for plaintiff in error. *Joseph D. Redding, contra.*

**MILLER, J.**, delivered the opinion of the court:

The questions certified arise on a demurrer to an indictment against two Indians for murder committed on the Indian reservation of Hoopa Valley, in the State of California, the person murdered being also an Indian of said reservation. Though there are six questions certified as the subject of difference, the point of them all is well set out in the third and sixth, which are as follows: "3. Whether the provisions of said § 9 of the Act of Congress of March 3, 1885, making it a crime for one Indian to commit murder upon another Indian upon an Indian reservation situated wholly within the limits of a state of the Union, and making such Indian so committing the crime of murder within and upon such Indian reservation 'subject to the same laws' and subject to be 'tried in the same courts, and in the same manner, and subject to the same penalties as are all other persons' committing the crime of murder 'within the exclusive jurisdiction of the United States,' is a constitutional and valid law of the United States? 6. Whether the courts of the United States have jurisdiction or authority to try and punish an Indian belonging to an Indian tribe for committing the crime of murder upon another Indian belonging to the same Indian tribe, both sustaining the usual tribal relations, said crime having been committed upon an Indian reservation made and set apart for the use of the Indian tribe to which said Indians both belong?" The indictment sets out in two counts that Kagama, alias Pactah Billy, an Indian, murdered Iyouse, alias Ike, another Indian, at Humboldt County, in the State of California, within the limits of the Hoopa Valley Reservation, and it charges Mahawaha, alias Ben, also an Indian, with aiding and

abetting in the murder. The law referred to in the certificate is the last section of the Indian appropriation act of that year, and is as follows: "Sec. 9. That immediately upon, and after the date of the passage of, this act all Indians committing against the person or property of another Indian or other person any of the following crimes, namely, murder, manslaughter, rape, assault with intent to kill, arson, burglary, and larceny, within any territory of the United States, and either within or without the Indian reservation, shall be subject therefor to the laws of said territory relating to said crimes, and shall be tried therefor in the same courts and in the same manner, and shall be subject to the same penalties, as are all other persons charged with the commission of the said crimes respectively; and said courts are hereby given jurisdiction in all such cases; and all such Indians committing any of the above-described crimes against the person or property of another Indian or other person, within the boundaries of the United States, and within the boundaries of any state of the United States, and within the limits of any Indian reservation, shall be subject to the same laws, tried in the same courts and in the same manner, and subject to the same penalties, as are all other persons committing any of the above crimes within the exclusive jurisdiction of the United States." The above enactment is clearly separable into two distinct definitions of the conditions under which Indians may be punished for the same crimes as defined by the common law. The first of these is where the offense is committed within the limits of a territorial government, whether on or off an Indian reservation. In this class of cases the Indian charged with the crime shall be judged by the laws of the territory on that subject, and tried by its courts. This proposition itself is new in the legislation of Congress, which has heretofore only undertaken to punish an Indian who sustains the usual relation to his tribe, and the offence is committed in the Indian country, or on an Indian reservation, in exceptional cases; as where the offence was against the person or property of a white man, or is some violation of the trade and intercourse regulations imposed by Congress on the Indian tribes. It is new, because it now proposes to punish these offences when they are committed by one Indian on the person or property of another. The second is where the offence is committed by one Indian against the person or property of another, within the limits of a state of the Union, but on an Indian reservation.

In this case, of which the state and its tribunals would have jurisdiction if the offence was committed by a white man outside an Indian reservation, the courts of the United States are to exercise jurisdiction as if the offence had been committed at some place within the exclusive jurisdiction of the United States. The first clause subjects all Indians, guilty of these crimes committed within the limits of a territory, to the laws

of that territory, and to its courts for trial. The second, which applies solely to offences by Indians which are committed within the limits of a state and the limits of a reservation, subjects the offenders to the laws of the United States passed for the government of places under the exclusive jurisdiction of those laws, and to trial by the courts of the United States. This is a still further advance as asserting this jurisdiction over the Indians within the limits of the states of the Union. Although the offence charged in this indictment was committed within a state and not within a territory, the considerations which are necessary to a solution of the problem in regard to the one, must in a large degree affect the other.

The Constitution of the United States is almost silent in regard to the relations of the government which were established by it to the numerous tribes within its borders. In declaring the basis on which representation in the lower branch of the Congress and direct taxation should be apportioned, it was fixed that it should be according to numbers, excluding Indians not taxed, which, of course excluded nearly all of that race, but which meant that if there were such within a state as were taxed to support the government, they should be counted for representation, and in the computation for direct taxes levied by the United States. This expression, "excluding Indians not taxed," is found in the Fourteenth Amendment, where it deals with the same subject under the new conditions produced by the emancipation of the slaves. Neither of these shed much light on the power of Congress over the Indians in their existence as tribes distinct from the ordinary citizens of a state or Territory. The mention of Indians in the Constitution which has received most attention is that found in the clause which gives Congress "power to regulate commerce with foreign nations and among the several states, and with the Indian tribes." This clause is relied on in the argument in the present case, the proposition being that the statute under consideration is a regulation of commerce with the Indian tribes. But we think it would be a very strained construction of this clause, that a system of criminal laws for Indians living peaceably in their reservations, which left out the entire code of trade and intercourse laws justly enacted under that provision, and established punishments for the common law crimes of murder, manslaughter, arson, burglary, larceny, and the like, without any reference to their relation to any kind of commerce, was authorized by the grant of power to regulate commerce with the Indian tribes. While we are not able to see in either of these clauses of the Constitution and its amendments any delegation of power to enact a code of criminal law for the punishment of the worst class of crimes known to civilized life when committed by Indians, there is a suggestion in the manner in which the Indian tribes are introduced into that clause, which may have a bearing on the subject before us. The

commerce with foreign nations is distinctly stated as submitted to the control of Congress. Were the Indian tribes foreign nations? If so, they came within the first of the three classes of commerce mentioned, and did not need to be repeated as Indian tribes. Were they nations, in the minds of the framers of the Constitution? If so, the natural phrase would have been "foreign nations and Indian nations," or, in the terseness of language uniformly used by the framers of the instrument, it would naturally have been "foreign and Indian nations." And so in the case of *The Cherokee Nation v. State*, brought in the supreme court of the United States, under the declaration that the judicial power extends to suits between a state and foreign states, and giving to the Supreme Court original jurisdiction where a State is a party, it was conceded that Georgia as a State came within the clause, but held that the Cherokees were not a State or nation within the meaning of the Constitution, so as to be able to maintain the suit. 5 Pet. 20. But these Indians are within the geographical limits of the United States. The soil and the people within these limits are under the political control of the government of the United States, or of the States of the Union. There exists within the broad domain of sovereignty but these two. There may be cities, counties, and other organized bodies with limited legislative functions, but they are all derived from, or exist in subordination to, one or the other of these. The territorial governments owe all their powers to the statutes of the United States conferring on them the powers which they exercise, and which are liable to be withdrawn, modified, or repealed at any time by Congress. What authority the State governments may have to enact criminal laws for the Indians will be presently considered. But this power of Congress to organize territorial governments, and make laws for their inhabitants, arises not so much from the clause in the Constitution in regard to disposing of and making rules and regulations concerning the territory and other property of the United States, as from the ownership of the country in which the territories are, and the right of exclusive sovereignty which must exist in the national government, and can be found nowhere else. *Murphy v. Ramsey*, 114 U. S. 44. In the case of *American Ins. Co. v. Canter*, 1 Pet. 542, in which the condition of the people of Florida, then under a territorial government, was under consideration, Marshall, Chief Justice, said: "Perhaps the power of governing a territory belonging to the United States which has not, by becoming a State, acquired the means of self-government, may result necessarily from the fact that it is not within the jurisdiction of any particular State, and is within the power and jurisdiction of the United States. The right to govern may be the inevitable consequence of the right to acquire territory. Whichever may be the source whence the power is derived, the possess-

ion of it is unquestionable." In the case of *U. S. v. Rogers*, 4 How. 572, where a white man pleaded in abatement to an indictment for murder committed in the country of the Cherokee Indians, that he had been adopted by and became a member of the Cherokee tribe, Chief Justice Taney said: "The country in which the crime is charged to have been committed is a part of the territory of the United States, and not within the limits of any State. It is true it is occupied by the Cherokee Indians, but it has been assigned to them, and they hold with the assent and under the authority of the United States." After referring to the policy of the European nations and the United States in asserting dominion over all the country discovered by them, and the justice of this course he adds: "But had it been otherwise, and were the right and propriety of exercising this power now open to question, yet it is a question for the law-making and political departments of the government, and not for the judicial. It is our duty to expound and execute the law as we find it, and we think it too firmly and clearly established to admit of dispute, that the Indian tribes, residing within the territorial limits of the United States, are subject to their authority, and when the country occupied by one of them is not within the limits of one of these, Congress may by law punish every offence committed there, no matter whether the offender be a white man or an Indian." The Indian reservation in the case before us is land bought by the United States from Mexico, by the treaty of Guadalupe, Hidalgo, and the whole of California, with the allegiance of its inhabitants, many of whom were Indians, was transferred by that treaty to the United States. The relation of the Indian tribes living within the borders of the United States, both before and since the revolution, to the people of the United States has always been an anomalous one and of a complex character. Following the policy of the European governments in the discovery of America towards the Indians who were found here, the colonies before the revolution, and the United States since, have recognized in the Indians a possessory right to the soil over which they roamed and hunted and established occasional villages. But they asserted an ultimate title in the land itself, by which the Indian tribes were forbidden to sell or transfer it to other nations or peoples without the consent of this paramount authority. When a tribe wished to dispose of its land, or any part of it, or the State or the United States wished to purchase it, a treaty with the tribe was the only mode in which this could be done. The United States recognized no right in private persons, or in other nations, to make such a purchase by treaty or otherwise. With the Indians themselves these relations are equally difficult to define. They were, and always have been regarded as having a semi-independent position when they preserved their tribal relations; not as States, not as nations, not as possessed of the full

attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the State within whose limits they resided. Perhaps the best statement of their position is found in the two opinions of this court by Chief Justice Marshall, in the case of the Cherokee Nation v. Georgia, 5 Pct. 1, and in the case of Worcester v. State, 6 Ib. 536. These opinions are exhaustive; and in the separate opinion of Mr. Justice Baldwin in the former case is a very valuable resume of the treaties and statutes concerning the Indian tribes previous to and during the confederation. In the first of the above cases it was held that these tribes were neither States nor nations, had only some of the attributes of sovereignty, and could not be so far recognized in that capacity as to sustain a suit in the Supreme Court of the United States. In the second case it was said, that they were not subject to the jurisdiction asserted over them by the State of Georgia, which, because they were within its limits, where they had been for ages, had attempted to extend her laws and the jurisdiction of her courts over them. In the opinions in these cases they are spoken of as "wards of the nation," "pupils," as local dependent communities. In this spirit the United States has conducted its relations to them from its organization to this time. But, after an experience of a hundred years of the treaty-making system of government, Congress has determined upon a new departure — to govern them by the acts of Congress. This is seen in the Act of March 3, 1871, embodied in § 2079 of the Revised Statutes: "No Indian nation or tribe, within the territory of the United States, shall be acknowledged or recognized as an independent nation, tribe, or power, with whom the United States may contract by treaty; but no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March 3, 1881, shall be hereby invalidated or impaired." The case of *Crow Dog*, 109 U. S. 556, in which an agreement with the Sioux Indians, ratified by an act of Congress, was supposed to extend over them the laws of the United States and the jurisdiction of its courts, covering murder and other grave crimes, shows the purpose of Congress in this new departure. The decision in that case admits that if the intention of Congress had been to punish, by the United States courts, the murder of one Indian by another, the law would have been valid. But the court could not see, in the agreement with the Indians sanctioned by Congress, a purpose to repeal § 2146 of the Revised Statutes which expressly excludes from that jurisdiction the case of a crime committed by one Indian against another in the Indian country. The passage of the act now under consideration was designed to remove that objection, and to go farther by including such crimes on reservations lying within a State. Is this latter fact a fatal objection to the law? The statute

itself contains no express limitation upon the powers of a State or the jurisdiction of its courts. If there be any limitation in either of these, it grows out of the implication arising from the fact that Congress has defined a crime committed within the State, and made it punishable in the courts of the United States. But Congress has done this, and can do it, with regard to all offenses relating to matters to which the Federal authority extends. Does that authority extend to this case?

It will be seen at once that the nature of the offense (murder) is one which in most all cases of its commission is punishable by the laws of the States, and within the jurisdiction of their courts. The distinction is claimed to be, that the offense under the statute is committed by an Indian, that it is committed on a reservation set apart within the State for residence of the tribe of Indians by the United States, and the fair inference is that the offending Indian shall belong to that or some other tribe. It does not interfere with the process of the State courts within the reservation, nor with the operation of State laws upon white people found there. Its effect is confined to the acts of an Indian of some tribe, of a criminal character, committed within the limits of the reservation.

It seems to us that this is within the competency of Congress. These Indian tribes are the wards of the nation. They are communities dependent on the United States—dependent largely for their daily food; dependent for their political rights. They owe no allegiance to the States, and receive from them no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the Federal government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the executive and by Congress, and by this court, whenever the question has arisen. In the case of *Worcester v. State*, 6 Pet. 515, it was held that, though the Indians had by treaty sold their land within that State, and agreed to remove away, which they had failed to do, the State could not, while they remained on those lands, extend its laws, criminal and civil, over the tribes; that the duty and power to compel their removal was in the United States, and the tribe was under their protection, and could not be subjected to the laws of the State and the process of its courts. The same thing was decided in the case of *Fellows v. Blacksmith*, 19 How. 366. In this case, also, the Indians had sold their lands under supervision of the States of Massachusetts and of New York, and had agreed to remove within a given time. When the time came a suit to recover some of the land was brought in the Supreme Court of New York, which gave judgment for the plaintiff. But this court held, on writ of error, that the State could not enforce this removal, but the duty and the power to do so

was in the United States. See, also, the case of the *Kansas Indians*, 5 Wall. 737; *New York Indians*, 5 Ib. 761. The power of the general government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that government, because it never has existed anywhere else, because the theater of its exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its laws on all the tribes.

We answer the questions propounded to us, that the ninth section of the Act of March 3d, 1885, is a valid law in both its branches, and that the circuit court of the United States for the District of California has jurisdiction of the offense charged in the indictment in this case.

NOTE.—The relations between the United States and the Indian tribes within their borders have always been anomalous, and especially have the powers of the Federal Government been circumscribed in the matter of criminal jurisdiction. Until the passage of the act of Congress, under which the indictment in the principal case was found,<sup>1</sup> Federal courts had no jurisdiction whatever of crimes committed by one Indian against another Indian within the "Indian country."<sup>2</sup> That country was defined by act of Congress of June 30, 1834,<sup>3</sup> but the section of the act so defining it, not being included in the Revised Statutes, was repealed by their enactment but were referred to by the Supreme Court in deciding what was Indian country. In *Crow Dog's case* (1883),<sup>4</sup> the court held that the term applies to all the country to which the Indian title has not been extinguished, within the limits of the United States, whether within a reservation or not, and whether acquired before or after the passage of the act of 1834. It is noteworthy that, before these cases were decided, it was held by the United States Circuit Court for the Ninth Circuit, that the act of Congress of June 30, 1834, which defined the limits of the Indian country,<sup>5</sup> was simply a local act, and applied only to the territory described in it, and then within the sovereignty of the United States.<sup>6</sup> And upon the same principle in the Circuit Court of the United States for Oregon, the court held in a criminal case,<sup>7</sup> that Alaska was not Indian country, notwithstanding the sweeping definition of that term in *Crow Dog's Case*.<sup>8</sup> The court seems to have regarded the *dictum* in the *Crow Dog Case* as *obiter*, not being necessary to the decision of the case, and therefore not binding upon the circuit court.

The act under which this indictment is found closes all controversy, so far as the crimes enumerated in it are concerned, committed by one Indian on or against another Indian, no matter where; unless, indeed, it infringes the right of a State in which a reservation inhabited by Indians is situated. In the principal case the court holds that the whole subject of criminal ju-

<sup>1</sup> Act of March 3, 1885; Sess. Acts of 1885, p. 385.

<sup>2</sup> Rev. Stat. U. S. § 2146.

<sup>3</sup> 4 U. S. Stat. at Large, p. 729.

<sup>4</sup> 109 U. S. 556; See also, *Bates v. Clark*, 95 U. S. 204.

<sup>5</sup> 4 U. S. Stat. at Large, 729.

<sup>6</sup> *United States v. Seveloff*, 2 Sawy. C. C. 311; See also, *Re Carr*, 3 Sawy. 317; *Waters v. Campbell*, 4 Sawy. C. C. 121; *United States v. Stephens*, 8 Sawy. C. C. 117.

<sup>7</sup> *Kie v. United States*, 27 Fed. Rep. 351 (May 1, 1886).

<sup>8</sup> 109 U. S. 556.

isdiction is within the control of Congress, because the Indians are the "wards of the nation." A better reason is that the Indian tribes, whether at large or upon reservations, are *quasi* independent powers, whose relations with the State or Federal governments can only be maintained through Congress; that the States cannot make treaties with them; that, under the Constitution, the Federal government only can deal with them as tribes, and regulate commerce with them as individuals; that holding an occupancy title to the lands included in the reservation, the State can acquire no rights over the reservation, inconsistent either with that title, or such supervision of Congress as may be necessary to the exercise of its constitutional functions respecting either public lands or Indian tribes.—ED. CENT. L. J.

## WEEKLY DIGEST OF RECENT CASES.

CALIFORNIA,	6, 15, 22, 26, 33, 41
CONNECTICUT,	9, 43
ENGLAND,	5, 17, 18
IOWA,	7, 19, 30, 35
KENTUCKY	11, 14, 37
MAINE,	36
MASSACHUSETTS,	20
MINNESOTA,	23, 24, 25, 28, 32, 34
NEBRASKA,	1, 2, 12, 21, 31
NEW HAMPSHIRE,	3, 27, 29, 44
NEW JERSEY,	40, 42
PENNSYLVANIA,	39
TEXAS,	4, 8
VERMONT,	10, 13, 16
WISCONSIN,	38

1. ATTORNEY AND COUNSELOR.—*Unauthorized Attorneys—Dower—Partition by Widow.*—Where proceedings in partition were instituted by an attorney in this State, who received his authority from another attorney residing in another State, who claimed to have been employed by plaintiff, but which authority she denied: *Held*, there being no proof of knowledge of the pendency of the proceedings on the part of the plaintiff, or proof of authority to bring the action, a sale under the partition would be set aside. In this State a widow is entitled to dower, or the use during her natural life of one-third part of all the lands whereof her husband was seized of an estate of inheritance at any time during the marriage, unless she is lawfully barred thereof. A mere dower interest is not sufficient to authorize the person entitled thereto to institute a suit in partition, and cause the estate of the heirs to be sold. *Hurst v. Hotelling*, S. C. Neb., Sept. 29, 1886; 29 N. W. Rep. 299.

2. COUNTIES.—*Township Organization—Change—Unauthorized Election—Change in Government.*—The question of adopting township organization was submitted to the legal voters of R. county at the general election in 1883, and was adopted by a majority of the legal voters of said county voting at said election, but no organization of the board of supervisors has yet taken place. *Held*, that township organization is in force in R. county, to be completed upon the organization of the board of supervisors as provided by law. An election to discontinue township organization, unless authorized by statute, is of no avail, and votes cast thereat are nullities. In a county which has adopted

township organization, the board of county commissioners continue to act until the board of supervisors have met and organized. *State, ex rel. v. Kinzer*, S. C. Neb., Sept. 29, 1886; 29 N. W. Rep. 307.

3. COVENANTS.—*Running with the Land—Mortgagor of Leasehold Liable on—Assumpsit—Use and Occupation—Assignee of Lease.*—A mortgagor in possession is so far the owner of the mortgaged property that he is liable upon the covenants that run with the land, and therefore the assignee of a lease for 999 years is liable upon the covenant for rent during the time he holds the lease, notwithstanding he gave a mortgage back to his assignor upon receiving the assignment. *Assumpsit* for use and occupation will not lie against the assignee of a lease as such. *Trustees of Donations v. Streeter*, S. C. N. H., July 30, 1886; 5 Atl. Rep. 845.

4. CRIMINAL LAW.—*Assault and Battery—Intent—Striking with a Pistol—Self-Defense—Ejectment from Gambling-Room.*—An assault committed by striking with a pistol is, under the law of Texas (Pen. Code, arts. 46, 496), simple assault, notwithstanding the person assaulted was wounded by the accidental discharge of the pistol used in the assault, unless it is shown that a pistol was, when used in such a manner, a deadly weapon; or that by means of such use of it serious bodily injury had been inflicted, or that the assault was committed with premeditated design, and by the use of means calculated to inflict great bodily injury. *Held*, that the facts in the case were such that the trial justice should have charged upon the law of self-defense as set out in Pen. Code, arts. 570, 572. The law knows no reasonable rules for the protection of a gambling-room or games played in violation of law, and hence a gambler on trial for assault cannot justify on the ground that the assault was committed in ejecting the person assaulted from a gambling-room, for disorder. *Pierce v. State*, Texas Ct. App., June 28, 1886; 1 S. W. Rep. 463.

5. ———. *False Pretenses—False Statement by Lodger—Food Supplied Subsequently—Reasonable Inference for Jury.*—Prisoner went to the house of prosecutrix and requested to be taken in as a lodger. After having lodged with her for a day or two, he stated that he had come from another lodging where he had left some of his clothes, and requested to be furnished with board as well as lodging, for which he promised to pay. The prosecutrix, believing his statement as to his clothes, agreed to supply him, and did supply him with meat and drink as a boarder. A few days after the prisoner decamped without paying for his accommodation. At the trial of an indictment for obtaining goods by false pretenses, the jury were directed that they must be satisfied that the pretense was false; that it was acted upon by the prosecutrix in supplying the articles in question; and that it was made by the prisoner with intent to defraud. The jury having found a verdict of guilty, the question was reserved for this court, whether upon facts the prisoner was entitled to an acquittal. *Held*, that the direction was substantially accurate; that upon the evidence the jury might fairly infer that the prosecutrix had acted on what she believed; and that from the facts stated it was to be inferred that the jury meant she so acted because she believed to be true the statement of the prisoner, which was in fact false. *Regina*

itself contains no express limitation upon the powers of a State or the jurisdiction of its courts. If there be any limitation in either of these, it grows out of the implication arising from the fact that Congress has defined a crime committed within the State and made it punishable in the courts of the United States. But Congress has done this, and can do it, with regard to all offenses relating to matters to which the Federal authority extends. Does that authority extend to this case?

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It seems to us that this is within the competency of Congress. These Indian tribes are the wards of the nation. They are communities dependent on the United States—dependent largely for their daily food; dependent for their political rights. They owe no allegiance to the States, and receive from them no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the Federal government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the executive and by Congress, and by this court, whenever the question has arisen. In the case of *Worcester v. State*, 6 Pet. 515, it was held that, though the Indians had by treaty sold their land within that State, and agreed to remove away, which they had failed to do, the State could not, while they remained on those lands, extend its laws, criminal and civil, over the tribes; that the duty and power to compel their removal was in the United States, and the tribe was under their protection, and could not be subjected to the laws of the State and the process of its courts. The same thing was decided in the case of *Fellows v. Blacksmith*, 19 How. 366. In this case, also, the Indians had sold their lands under supervision of the States of Massachusetts and of New York, and had agreed to remove within a given time. When the time came a suit to recover some of the land was brought in the Supreme Court of New York, which gave judgment for the plaintiff. But this court held, on writ of error, that the State could not enforce this removal, but the duty and the power to do so

was in the United States. See, also, the case of the *Kansas Indians*, 5 Wall. 737; *New York Indians*, 5 Ib. 761. The power of the general government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that government, because it never has existed anywhere else, because the theater of its exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its laws on all the tribes.

We answer the questions propounded to us, that the ninth section of the Act of March 3d, 1885, is a valid law in both its branches, and that the circuit court of the United States for the District of California has jurisdiction of the offense charged in the indictment in this case.

NOTE.—The relations between the United States and the Indian tribes within their borders have always been anomalous, and especially have the powers of the Federal Government been circumscribed in the matter of criminal jurisdiction. Until the passage of the act of Congress, under which the indictment in the principal case was found,<sup>1</sup> Federal courts had no jurisdiction whatever of crimes committed by one Indian against another Indian within the "Indian country."<sup>2</sup> That country was defined by act of Congress of June 30, 1834,<sup>3</sup> but the section of the act so defining it, not being included in the Revised Statutes, was repealed by their enactment but were referred to by the Supreme Court in deciding what was Indian country. In *Crow Dog's case* (1883),<sup>4</sup> the court held that the term applies to all the country to which the Indian title has not been extinguished, within the limits of the United States, whether within a reservation or not, and whether acquired before or after the passage of the act of 1834. It is noteworthy that, before these cases were decided, it was held by the United States Circuit Court for the Ninth Circuit, that the act of Congress of June 30, 1834, which defined the limits of the Indian country,<sup>5</sup> was simply a local act, and applied only to the territory described in it, and then within the sovereignty of the United States.<sup>6</sup> And upon the same principle in the Circuit Court of the United States for Oregon, the court held in a criminal case,<sup>7</sup> that Alaska was not Indian country, notwithstanding the sweeping definition of that term in *Crow Dog's Case*.<sup>8</sup> The court seems to have regarded the *dictum* in the *Crow Dog Case* as *obiter*, not being necessary to the decision of the case, and therefore not binding upon the circuit court.

The act under which this indictment is found closes all controversy, so far as the crimes enumerated in it are concerned, committed by one Indian on or against another Indian, no matter where; unless, indeed, it infringes the right of a State in which a reservation inhabited by Indians is situated. In the principal case the court holds that the whole subject of criminal ju-

<sup>1</sup> Act of March 3, 1885; Sess. Acts of 1885, p. 385.

<sup>2</sup> Rev. Stat. U. S. § 2146.

<sup>3</sup> 4 U. S. Stat. at Large p. 729.

<sup>4</sup> 109 U. S. 556; See also, *Bates v. Clark*, 95 U. S. 204.

<sup>5</sup> 4 U. S. Stat. at Large, 729.

<sup>6</sup> *United States v. Seveloff*, 2 Sawy. C. C. 311; See also, *Re Carr*, 3 Sawy. 317; *Waters v. Campbell*, 4 Sawy. C. C. 121; *United States v. Stephens*, 8 Sawy. C. C. 117.

<sup>7</sup> *Kie v. United States*, 27 Fed. Rep. 351 (May 1, 1886).

<sup>8</sup> 109 U. S. 556.

isdiction is within the control of Congress, because the Indians are the "wards of the nation." A better reason is that the Indian tribes, whether at large or upon reservations, are *quasi* independent powers, whose relations with the State or Federal governments can only be maintained through Congress; that the States cannot make treaties with them; that, under the Constitution, the Federal government only can deal with them as tribes, and regulate commerce with them as individuals; that holding an occupancy title to the lands included in the reservation, the State can acquire no rights over the reservation, inconsistent either with that title, or such supervision of Congress as may be necessary to the exercise of its constitutional functions respecting either public lands or Indian tribes.—ED. CENT. L. J.

## WEEKLY DIGEST OF RECENT CASES.

CALIFORNIA, . . . . .	6, 15, 22, 26, 33, 41
CONNECTICUT, . . . . .	9, 43
ENGLAND, . . . . .	5, 17, 18
IOWA, . . . . .	7, 19, 30, 35
KENTUCKY . . . . .	11, 14, 37
MAINE, . . . . .	36
MASSACHUSETTS, . . . . .	20
MINNESOTA, . . . . .	23, 24, 25, 28, 32, 34
NEBRASKA, . . . . .	1, 2, 12, 21, 31
NEW HAMPSHIRE, . . . . .	3, 27, 29, 44
NEW JERSEY, . . . . .	40, 42
PENNSYLVANIA, . . . . .	39
TEXAS, . . . . .	4, 8
VERMONT, . . . . .	10, 13, 16
WISCONSIN, . . . . .	38

1. ATTORNEY AND COUNSELOR.—*Unauthorized Attorneys—Dower—Partition by Widow.*—Where proceedings in partition were instituted by an attorney in this State, who received his authority from another attorney residing in another State, who claimed to have been employed by plaintiff, but which authority she denied: *Held*, there being no proof of knowledge of the pendency of the proceedings on the part of the plaintiff, or proof of authority to bring the action, a sale under the partition would be set aside. In this State a widow is entitled to dower, or the use during her natural life of one-third part of all the lands whereof her husband was seized of an estate of inheritance at any time during the marriage, unless she is lawfully barred thereof. A mere dower interest is not sufficient to authorize the person entitled thereto to institute a suit in partition, and cause the estate of the heirs to be sold. *Hurst v. Hotelling*, S. C. Neb., Sept. 29, 1886; 29 N. W. Rep. 290.

2. COUNTIES.—*Township Organization—Change—Unauthorized Election—Change in Government.*—The question of adopting township organization was submitted to the legal voters of R. county at the general election in 1883, and was adopted by a majority of the legal voters of said county voting at said election, but no organization of the board of supervisors has yet taken place. *Held*, that township organization is in force in R. county, to be completed upon the organization of the board of supervisors as provided by law. An election to discontinue township organization, unless authorized by statute, is of no avail, and votes cast thereat are nullities. In a county which has adopted

township organization, the board of county commissioners continue to act until the board of supervisors have met and organized. *State, ex rel. v. Kinzer*, S. C. Neb., Sept. 29, 1886; 29 N. W. Rep. 307.

3. COVENANTS.—*Running with the Land—Mortgagor of Leasehold Liable on—Assumpsit—Use and Occupation—Assignee of Lease.*—A mortgagor in possession is so far the owner of the mortgaged property that he is liable upon the covenants that run with the land, and therefore the assignee of a lease for 999 years is liable upon the covenant for rent during the time he holds the lease, notwithstanding he gave a mortgage back to his assignor upon receiving the assignment. *Assumpsit* for use and occupation will not lie against the assignee of a lease as such. *Trustees of Donations v. Streeter*, S. C. N. H., July 30, 1886; 5 Atl. Rep. 845.

4. CRIMINAL LAW.—*Assault and Battery—Intent—Striking with a Pistol—Self-Defense—Ejectment from Gambling-Room.*—An assault committed by striking with a pistol is, under the law of Texas (Pen. Code, arts. 46, 496), simple assault, notwithstanding the person assaulted was wounded by the accidental discharge of the pistol used in the assault, unless it is shown that a pistol was, when used in such a manner, a deadly weapon; or that by means of such use of it serious bodily injury had been inflicted, or that the assault was committed with premeditated design, and by the use of means calculated to inflict great bodily injury. *Held*, that the facts in the case were such that the trial justice should have charged upon the law of self-defense as set out in Pen. Code, arts. 570, 572. The law knows no reasonable rules for the protection of a gambling-room or games played in violation of law, and hence a gambler on trial for assault cannot justify on the ground that the assault was committed in ejecting the person assaulted from a gambling-room, for disorder. *Pierce v. State*, Texas Ct. App., June 28, 1886; 1 S. W. Rep. 463.

5. ———. *False Pretenses—False Statement by Lodger—Food Supplied Subsequently—Reasonable Inference for Jury.*—Prisoner went to the house of prosecutrix and requested to be taken in as a lodger. After having lodged with her for a day or two, he stated that he had come from another lodging where he had left some of his clothes, and requested to be furnished with board as well as lodging, for which he promised to pay. The prosecutrix, believing his statement as to his clothes, agreed to supply him, and did supply him with meat and drink as a boarder. A few days after the prisoner decamped without paying for his accommodation. At the trial of an indictment for obtaining goods by false pretenses, the jury were directed that they must be satisfied that the pretense was false; that it was acted upon by the prosecutrix in supplying the articles in question; and that it was made by the prisoner with intent to defraud. The jury having found a verdict of guilty, the question was reserved for this court, whether upon facts the prisoner was entitled to an acquittal. *Held*, that the direction was substantially accurate; that upon the evidence the jury might fairly infer that the prosecutrix had acted on what she believed; and that from the facts stated it was to be inferred that the jury meant she so acted because she believed to be true the statement of the prisoner, which was in fact false. *Regina*



estate of a decedent, unless such possession is vested in him by order of court; and where the land contains stone valuable for fences, he has no power to contract with the tenant, authorizing him to remove the stone, whether lying loose on the surface or imbedded in the ground. Injunction will lie, at the suit of a purchaser of land sold by an executor, to restrain the tenant in possession from removing stone therefrom, where it appears that, if the writ is denied, there will result a continuing trespass and a multiplicity of suits. *Ellis v. Wren*, Ct. Appl. Ky. Sept. 23, 1886; 1 S. W. Rep. 440.

15. FRAUD.—*Statute of Frauds—Verbal Agreement to Sell Horses—Delivery.*—A verbal agreement to sell a number of unbroken horses at a price exceeding \$200, there being no delivery of them except that part of the number were corralled, broken, and turned into the vendor's pasture, and no part of the purchase money being paid, is a contract within the statute of frauds, and void. *Terney v. Doten*, S. C. Cal. Aug. 12, 1886; 11 Pac. Rep. 743.

16. HIGHWAY.—*Pent Roads—Presumption—Agency Estoppel—Evidence—Judicial Notice.*—The judgment of the county court in establishing a highway will be sustained unless substantial injustice has been done, or a writ of *certiorari* would be granted; and this writ is often denied where there is no injustice, though some formal legal error has been committed. The selectmen laid a highway two rods wide in a village, and on petition the county court appointed commissioners, who reported that they adopted the survey of the selectmen and recommended that the highway be established as laid by them; this report was confirmed by the court, and the petitioners excepted because the road was laid less than three rods in width. The record did not designate whether it was an open road, a cross-road, or pent road; and by statute some roads must be laid three rods wide and some may be two rods. Held (1), that the presumption is, that this is such a highway as may be legally established of the width of two rods; (2) and it was not error that permission was not given for the erection of gates and bars, as it does not appear that there was any necessity for them. The highway was laid across land owned by the Methodist Episcopal Society, whose stewards had agreed with their grantors that the church lot should remain open and unobstructed, but without any vote of the quarterly meeting conference, as required by R. L., § 1961, and the society had acquiesced in the acts of its stewards for more than twenty years; \$250 were allowed as damages if the agreement was still binding, and \$300 if it was not. Held, that the society, by retaining the benefit of the acts of its agents, is now estopped from denying their validity. The commissioners properly took judicial notice of the statutes and geography of the State in their finding that Barre was not an incorporated village. *French v. Town of Barre*, E. C. Vt. Aug. 21, 1886; 7 East Rep. 807.

17. INSURANCE.—*Life—Acceptance of Proposal—Accident before Payment of Premium.*—An insurance company wrote accepting a proposal by C. to insure his life, his declaration as to his being then in good health, &c., to be the basis of the contract. At the bottom of the letter there was a note, "No assurance can take place until the first premium is paid." Before the time for payment of the premium, C. met with an accident, of which he afterwards died: Held, that there was no com-

plete contract, and the risk having changed before tender of the premium, the company was entitled to refuse completion. *Canning v. Farquhar*, Eng. Ct. App. London Law Times Rep. Vol. 54, p. 350. Oct. 9, 1886.

18. —. —*Life—Want of Insurable Interest—Wagering Policies—Recovery of Premiums.*—J. H. effected with the defendant company two policies of insurance on the life of his father J. H., in which he had no insurable interest; according to the policies, the premiums were to be paid in weekly payments. J. H., the son, continued to make these weekly payments for some years. J. H., the father, had at first no knowledge of the insurance effected on his life, but when he became aware of them he objected to their being continued, and gave notice to that effect to the company. J. H. the son, then gave notice to the defendants that the policies were at an end, and claimed the return of the amount of the premiums. The defendants refused to pay, and J. H., the son, brought his action for their recovery, and the County Court judge gave judgment for the plaintiff. The defendant appealed. Held, on appeal, that, under the circumstances of the case, the policies were wagering policies, and consequently the premiums paid in respect to them could not be recovered. *Howard v. Refuge, etc. Society*, Eng. Ct. Appl. London Law Times, Rep. Vol. 54, p. 644, Oct. 9, 1886.

19. INTOXICATING LIQUORS.—*Pleading—Abatement of Nuisance—Lawful Business—Iowa Statute of 1885—Constitutionality of—Constitutional Law—Due Process of Law—Proceeding in Equity—Trial by Jury—Constitution of the United States—Trial in State Courts.*—A pleading which alleges that a building was erected and used "as a place for the sale of beverages such as the law at that time authorized," and that the defendant purchased the property for the purpose of using it in "a business at that time authorized by the laws of said state," is bad, as stating a conclusion of law rather than matter of fact. In a suit in equity to enjoin a saloon keeper from selling intoxicating liquors, and to have his establishment abated as a nuisance, before it can be said that defendant has been unlawfully deprived of his property without compensation, it must be made to appear that such property was owned by him, or by those under whom he claims, prior to the enactment of the statute of Iowa of 1885 declaring such an establishment a nuisance. A proceeding in equity is due process of law. The constitution of the United States has no bearing upon the question of the right of trial by jury in the state courts. *McLane v. Leicht*, S. C. Iowa, Oct. 5, 1886; 29 N. W. Rep. 327, 328.

20. LIMITATIONS.—*Statute of Limitations.*—Where the statute of limitations would be a bar to a direct proceeding by the original owner, it cannot be defeated by indirection within the jurisdiction where it is law. Hence, where certain counters were attached to premises, and in the adverse possession of the owner of such premises, sufficiently long to satisfy the Statute of Limitations, they cannot be recovered by the original owner in a replevin suit. A purchase from one against whom the remedy is barred entitles the purchaser to stand in as good a position as his vendor. Hence, a purchaser at a foreclosure sale of the premises will be protected by the statute. *Chapin v. Freeland*, S. J. Ct. Mass., Sept. 8, 1886; 2 N. Eng. Rep. 732.

21. **LIMITATIONS—Statute of Limitations—Mortgage—Debt—Foreclosure—Evidence—Notes—Limitations.**—The Act of 1869, by extending the period of limitation of mortgages of real estate to ten years, necessarily extended the limitation of the debt secured by the mortgage, where it is sought to enforce a sale of the mortgaged premises in satisfaction of said debt, to the same period as the mortgage. In an action to foreclose a mortgage of real estate given to secure certain promissory notes, the note may be set out as the evidence of the debt, even if the action is brought but a few days before the expiration of ten years from the time the cause of action accrued. For the purpose of foreclosure, the notes continue as evidence of the debt until the mortgage is levied. *Cheney v. Woodruff*, S. C. Neb. Sept. 22, 1886; 29 N. W. Rep. 273.

22. **MASTER AND SERVANT—Safe Machinery—Duty of Master—How Affected by Servant's Knowledge of Defects.**—An employer, being in duty bound to provide safe machinery for use by his employees, cannot divest himself of liability by intrusting the performance of such duty to a servant. A master's liability for injuries to a servant caused by defective machinery does not apply to a case where the servant, knowing, or having the means of knowing, of the defects, and knowing of the perils to which they exposed him, pursued his employment in spite of them. *Sanborn v. Madera, etc. Co.*, S. C. Cal. July 28, 1886; 11 Pac. Rep. 710.

23. **MORTGAGE—Assumption by Vendee—Payment—Subrogation—Estoppel.**—To secure his note for \$2,000, E. mortgaged certain land, which, subject to a mortgage to S., was owned by him, to H. The collection of the note was guaranteed by G. and R. E., by warranty deed, conveyed the land to W., subject to both mortgages; W., in the deed, and as part of the consideration thereof, assuming to pay both. W., by warranty deed, conveyed the land to M., subject to both mortgages; M., in the deed, and as part of the consideration thereof, assuming to pay both mortgages. Subsequently the S. mortgage was duly foreclosed, and on the next day after the expiration of the period of redemption the purchaser at the foreclosure sale executed to M. a quitclaim deed of the land. E. having failed to pay the guaranteed note at maturity, G. and R., the guarantors, immediately after his default, paid to H. the amount due thereon, and some six years afterwards, and after the commencement of this action, took an assignment of the mortgage from H. Six hundred and eighty-five dollars and seven cents of the amount of the H. note and mortgage has not been paid to G. and R. *Held*, (1) that M. is estopped to set up the title acquired by him through the foreclosure as against the H. mortgage; (2) that G. and R., as sureties, had the right to pay the H. note, after it fell due, for their own safety and protection, and without reference to whether H. could collect of E. or not, and upon such payment they were immediately entitled to be subrogated to the securities held by H., and, among others, to the H. mortgage, and M.'s obligation to pay the same; (3) that the fact that the right of action of G. and R. against E. is barred by the statute of limitations does not extinguish the lien of the H. mortgage, against which the statute has taken effect, or take away their right of subrogation to it. *Connor v. How*, S. C. Minn. Sept. 30, 1886; 29 N. W. Rep., 314.

24. **MORTGAGE—Chattel Mortgage—Description of Property—Identification—Evidence—Evidence Admissible—Right of Mortgagee—Conversion by Stranger.**—A chattel mortgage of "all that certain stock of one-inch seasoned lumber, being one car load of about 12,000 feet," and further describing the property as being at a particular place in the city of M., may, as between the parties, or as to a subsequent purchaser with notice, or a stranger, be shown by evidence to be applicable to a carload of such lumber standing at a different place in the city from that named in the mortgage. Evidence showing that the parties understood that the property was to be removed to the place designated in the mortgage would be admissible to apply the mortgage to property otherwise correctly described. A mortgagee, having the right of possession, may recover the full value of the property even in excess of his debt, in an action against a stranger who shows no right to the property. *Adamson v. Peterson*, S. C. Minn. Oct. 1, 1886; 29 N. W. Rep. 321.

25. —. **Debt Secured—Forged Notes.**—To secure the price of a harvester, O., as principal, and J., the plaintiff, as surety, executed three notes, and delivered them to defendants' agents, by whom the harvester was sold to O. Afterwards, and before the notes were handed over to defendants, the agent permitted O. to take up the notes, and substitute for them three others, purporting to be signed by him and J., but upon which the signatures of J. were forged; the agents knowing that they were not written by J. The agents forwarded the notes to defendants, who had no notice of any facts affecting their genuineness till about the time of the commencement of this action, before which time, acting in good faith, and without any notice or knowledge that the notes forwarded to them were not the original notes given by O. and J., defendants, through their attorney, took from plaintiff three other notes executed by him, and secured by mortgages of his real estate, which notes and mortgages were taken ostensibly to secure the notes upon which plaintiff's signature was forged, but which both parties supposed to be the original notes; so that, in the intention of the parties the mortgages and notes secured by them, were in fact taken to secure the indebtedness evidenced by the original notes. *Held* giving effect to the intention and common purpose of the parties, that the mortgages, and notes secured by them, must be taken and treated as given and received to secure the original indebtedness. *Egan v. Fuller*, S. C. Minn. Sept. 30, 1886; 29 N. W. Rep. 313.

26. **NEGLIGENCE—Evidence—Prima Facie Case—Contributory Negligence—Prudence Required in Danger.**—Where a plaintiff shows that she was injured by the overturning of a coach, caused by the breaking of one of its wheels while it was being driven round a curve, down grade, on a mountain road, where one side of the track was about a foot lower than the other, she has made out a *prima facie* case; and if no evidence is given to show that there was no defect in the wheel, and that the defendant was not guilty of negligence, she is entitled to recover. It is error for the court to instruct the jury "that a coach proprietor is never responsible for the imprudence of his passengers." The real question is whether, assuming the person injured to be ordinarily reasonable and prudent, the circumstances were so alarming as to de-

prive her of her ordinary reason, and to induce her instinctively to seek safety by an act which, although not such as the jury might believe to be prudent or discreet, was such as the generality of persons would have adopted in the dilemma in which she was placed. *Lawrence v. Green*, S. C. Cal. Aug. 17, 1886; 11 Pac. Rep. 750.

27. ———. *Railroads—Unsuitable Stopping Places—Trial—Statements by Counsel not in Evidence.*—In an action for personal injuries sustained on leaving the rear car of a train at a station, evidence that others had previously been directed to take that car, and in alighting from it as the plaintiff did, had been injured, is competent to show negligence in the defendants in not providing a suitable stopping place, and to show want of negligence in the plaintiff. When counsel in argument makes a statement of a material fact not in evidence, against the objection of the other party, he violates the right of a fair trial, and his client assumes the burden of presenting and proving his claim that the decision was not affected thereby. *Bullard v. Boston, etc. Co.* S. C. N. H. July 30, 1886; 5 Atl. Rep. 838.

28. ———. *Injury to Child by Dump Cars Used in Grading Street—Duty of Contractor.*—The defendant was employed in grading and improving a public street under a contract with the municipal authorities of a city, and, in the lawful occupation thereof for such purpose, was engaged in transporting earth a considerable distance along the same to make a fill. The cars moved slowly, and were dangerous only to persons attempting to ride upon, or accidentally falling upon, the track in front of the wheels. Held, in respect to the risk of such accidents, that the measure of defendant's duty was reasonable care, and that such duty did not extend to the employment of men specially to keep watch of the approach of children or others to prevent them from invading and riding upon the cars when in actual use, but where, in the use of ordinary care, their presence was discovered, to use due diligence to prevent any injury to them. *Emerson v. Peterler*, S. C. Minn. Sept. 6, 1886; 29 N. W. Rep. 311.

29. NOVATION.—*Assignment of Future Wages—Acceptance.*—When the acceptor of an assignment of future wages informs the assignee, after the wages are earned and due, that he will pay them to him, the assignment is completed, and there is a novation of parties and debt. *Clough v. Giles*, S. C. N. H. July 30, 1886; 5 Atl. Rep. 835.

30. PAYMENT.—*Presumption of Payment—Lapse of Time—Note.*—In an action upon a promissory note, the jury are authorized to consider, with other circumstances upon the issue of payment, the length of time which has elapsed since the time of the alleged payment, no matter what is alleged in the answer as to the manner of payment. *Manning v. Meredith*, S. C. Iowa, Oct. 7, 1886; 29 N. W. Rep. 336.

31. PLEADING.—*Answer—General Denial—Mechanic's Lien—Foreclosure.*—An answer consisting of a general denial of each and every allegation in the petition, places in issue all the allegations contained therein. *Donovan v. Fowler*, 17 Neb. 247; S. C., 22 N. W. Rep. 424. In an action to foreclose a mechanic's lien on real estate for material furnished in the construction of a building thereon, an answer consisting of a general denial is a de-

nial of the allegations of the sale of the material for the purpose alleged, and of the ownership of the real estate upon which the lien is sought to be established; and the burden of proof is upon the plaintiff to prove all facts necessary to the existence of such lien. *Hassett v. Curtis*, S. C. Neb., Sept. 29, 1886; 29 N. W. Rep. 295.

32. ———. *General Denial—Negative Pregnant—Accession and Confusion of Goods—Grain—Claims of Owners.*—A general denial is the same in effect as a specific denial of each of the allegations in the whole or in the part of the pleading so denied, and is a negative pregnant only where a mere specific denial would be. Where, without fraudulent intent, goods of the same nature and value, belonging to different owners, are mixed, if a division can be made of equal value, as in case of a mixture of grains of the same kind, quality and value, then each owner may claim his aliquot part of the whole mass. *Stone v. Quale*, S. C. Minn., October 5, 1886; 29 N. W. Rep. 324.

33. PRACTICE.—*Trial—Findings—Equitable Point—Issue—Witness—Cross-Examination—Question not Responsive—Ejectment—Instructions to Jury—Bad Instruction.*—A defendant cannot complain that the court made no finding upon an equitable point involved in the cause, when, by his own neglect to meet such point in his answer, no issue thereon has been raised. A question put in cross-examination as to a "side-line monument," not mentioned in the examination in chief, to a witness examined upon a certain map in evidence, is not responsive to such examination in chief. In an action to recover possession of a mine, an instruction informing the jury, as a matter of law, that the mere fact that the locators did not place a monument at a certain corner of the claim they intended to locate would be fatal to the plaintiff's right of recovery, when, according to all facts in evidence, the location was distinctly marked, so that its boundaries could be distinctly traced, would be in contravention of the statute, and would invade the province of the jury. *Anderson v. Black*, S. C. Cal., July 27, 1886; 11 Pac. Rep. 700.

34. SALE.—*Warranty—Quality of Wheat—Appeal—Instructions—Exceptions.*—Evidence considered as justifying a ruling by the jury, that certain wheat sold as "genuine Saskatchewan Fife wheat" was not warranted to be pure, or absolutely free from other seeds, and that there was no breach of warranty, although there were some impurities. Instructions to a jury not excepted to will not be reviewed. *Shatto v. Abernethy*, S. C. Minn., Oct. 1, 1886; 29 N. W. Rep. 325.

35. SUNDAY.—*Signing Note on Sunday—Delivery on Monday—Alteration of Instruments—Note—Substituting New Payee's Name—Ratification of Alteration—Requesting Extension after Knowledge of Alteration.*—A promissory note becomes a contract at the time of its delivery, and a note signed on Sunday, but not delivered until Monday, is not subject to the objection that it is a Sunday contract. The alteration of a promissory note by erasing the name of the original payee, and inserting another name, without the knowledge of one of the two makers of the note, is a material alteration, and the maker, who is ignorant of the alteration, will not be bound by the note unless he sub-

sequently ratifies the alteration. Requesting and obtaining an extension of time for the payment of a promissory note which has been materially altered by substituting the name of a new payee in place of the original name, after knowledge of such alteration, is such a ratification of the alteration as will bind the maker requesting the extension. *Bell v. Mahin*, S. C. Iowa, Oct. 5, 1886; 29 N. W. Rep. 331.

36. **VENDOR AND VENDEE.**—*Assumpsit for Purchase Money—Sale of Equitable Interest.*—A., holding a bond for a deed of certain real estate from B., in whom was the legal title; to secure a certain sum of money, sold his equitable interest to C., who paid a part of the consideration. C. subsequently paid B. the amount due him, and took a transfer of the legal title from B. to himself. In an action brought by A. against C.: *Held*, that A. could maintain *assumpsit* to recover the balance of the purchase price, less the amount paid B. in discharge of the incumbrance. *Bartlett v. Baker*, S. J. Ct. Me., Sept. 23, 1886; 5 Atl. Rep. 847.

37. ———. *Deferred Payment—Unpaid Matured Notes—Judgment for Total Amount of Lien and Sale of Land*—Upon default being made in the payment of such of several notes given in a land purchase as are then due, personal judgment may be had against the maker for the amount of the matured notes, but not judgment for the amount of all the notes, and a sale of the entire property to satisfy the vendor's lien. *Leopold v. Furber*, Ky. Ct. App., Sept. 11, 1886; 1 S. W. Rep. 404.

38. **WATERS AND WATER-COURSES.**—*Dam—Complaint—Description of Land Damaged by Overflow of Dam.*—In a suit for damages for overflowing land, and to have the dam which caused the overflow lowered, a description in the complaint of the land on a part of which the damage is claimed, is sufficient which locates it by government subdivisions as a 100-acre tract, "except eleven acres heretofore conveyed to the Milwaukee, Lake Shore & Western Railway Company for a right of way and depot grounds;" and the description of the land overflowed, as 44 acres on the easterly half of plaintiff's farm, is sufficiently definite. *Lake v. Loysen*, S. C. Wis. Sept. 21, 1886; 29, N. W. 214.

39. ———. *—Rights of Mine Operators—Riparian Rights—Pollution of Stream through Natural Use and Development of Coal Property—The Doctrine of Fletcher v. Rylands, L. R. 1 Ex. 280, Considered—Sanderson v. The Pennsylvania Coal Company, 5 Norris, 401 Overruled.*—Every man has the right to the natural use and enjoyment of his own property, and if, whilst lawfully in such use and enjoyment, without negligence or malice on his part, an unavoidable loss occurs to his neighbor, it is *damnum absque injuria*; for the rightful use of one's own land may cause damage to another without any legal wrong. The right to mine coal is not a nuisance in itself, it is a right incident to the ownership of coal property, and when exercised in the ordinary manner, and with due care, the owner cannot be held liable in damages for permitting the natural flow of mine water over his own land into a water course by of which the natural drainage of the country means is effected. The removal of water from the workings being essential to the business of mining, its dis-

charge into the natural water course and the consequent pollution of that stream is *damnum absque injuria* to lower riparian owners. *A fortiori* is this the case where the water flowing naturally from the tunnels is sufficient to cause the pollution, independently of the water pumped from the lower levels of the mines. That a case might arise in which such pollution by its injurious effects upon the general health would amount to a public nuisance of which the public interest, as involved in the general health and well being of the community, would require the abatement, is not denied. But no such question is involved in the present case. The doctrine of *Fletcher v. Rylands* (L. R. 1 Ex. 280) is subject to many exceptions in England, and has not been generally accepted in this country. That rule, moreover, is inapplicable to the present case. In this case defendants brought nothing upon their land, and the pollution complained of, was the result of natural, and not of artificial causes. *Pennsylvania, etc. Co. v. Sanderson*, S. C. Penn., Oct. 4, 1886; 18 Weekly Notes of Cases 181.

40. **WAYS.**—*Land-Owners not Assessable When not Specially Benefitted—Act Unconstitutional.*—The change of a turnpike to a common, free public road confers no special benefit upon the land-owner, and the statutory provision authorizing the assessment of the price of the turnpike upon the land-owners is unconstitutional and void. *State v. Essex Public Road Board*, N. J. Ct. Errors and Appeals, July 1, 1886; 5, Atl. Rep. 784.

41. ———. *—Public Highway—Dedication—Animus Dedicandi—Trial—Findings of Court—Issue Made Immaterial by Findings—Damages—Dammum Absque Injuria.*—Dedication of a public highway by the owner of the soil to the use of the public is never to be presumed without evidence of an unequivocal intention to dedicate on the part of the owner. The findings of facts by the trial court must be responsive to and cover all the material issues; but a material issue may become immaterial, so as to require no findings, by reason of findings upon other issues. No damage can be recovered for the consequences of a lawful act properly performed. If an injury is sustained, it is *damnum absque injuria*. *Quinn v. Anderson*, S. C. Cal., Aug. 26, 1886; 11 Pac. Rep. 746.

42. ———. *—Townships—Road Money—Apportionment.*—At the regular spring election Matawan township voted \$700 for their highways. Notice was posted, and on March 13th the township committee met, and apportioned to each overseer the share of money to be used by each. On March 17th part of the township voted to become an incorporated borough, and, in pursuance of the statute, elected, on April 7th, street commissioners, who have charge of the streets and highways. The collector of the township not having paid over to the overseers the amount apportioned by the township committee, and refusing to pay it to the commissioners of the borough, a writ of *mandamus* was asked to compel him to. *Held* that, as the inhabitants of the borough were voters who elected the township committee that made apportionment, they were actors therein, and the writ must be refused. *Board of Comrs of Matawan v. Horner*, S. C. N. J., Sept. 20, 1886.

43. **WILL.**—*Probate.*—In an action to set aside the probate of a will, on the ground of undue influence expressed by one of the legatees, a statement made

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out of court by such legatee, tending to show that he had used undue influence on the testator, and inconsistent with his testimony in court, is admissible both as an admission of a fact in issue by a party to the controversy, and also to affect his credibility as a witness. An objection, based merely on the order of proof, that evidence of such statement was admitted before the evidence sought to be contradicted by it had been given, is untenable. *Saunders' Appeal*, S. C. Conn., Aug. 1886; 2. N. Eng. Rep. 753.

44. WITNESS.--*Refreshing Memory--Private Cash-Book--Memoranda--Partnership--Dissolution--Accommodation Note--Accounting--Bill in Equity.*—A witness may refer to and read the items in his private cash-book as memoranda of payments made at the time of the transaction, to refresh his recollection. When on the dissolution of a firm, one of the partners, by agreement, is to wind up its affairs, and account to the others on the basis of their sharing equally in the assets, or equally assuming any deficit, and he, for the purpose of convenience only, takes up an accommodation note of the firm by giving his own note therefor, which he is afterwards obliged to pay, the others will be liable for their proportional share of it. When, on the dissolution of a firm, it is agreed that there shall be an accounting after the claims are collected and the debts are paid, a bill in equity is an appropriate proceeding therefor. *Converse v. Hobbs*, S. C. N. H., July 20, 1886; 5 Atl. Rep. 832.

### QUERIES AND ANSWERS.\*

[Correspondents are requested to draw up their answers in the form in which we print them, and not in the form of letters to the editor. They are also admonished to make their answers as brief as may be.—Ed.]

#### QUERIES.

28. Section 1776, R. S. says: "Any affidavit or information may be amended in matters of form or substance, at any time, by leave of court before the trial and on the trial as to all matters of form and variance at the discretion of the court." What is the difference between an amendment as to "form or substance," and an amendment as to "form and variance"? H.

#### QUERIES ANSWERED.

Query 45. [22 Cent. L. J. 479.]—In city of the 4th class, organized under charter granted to such cities by Revised Statutes of 1879 of Missouri, in case of a tie in vote for Mayor, have Board of Aldermen, under § 4937, Rev. Stat. of Mo., the power to contest the election by casting out votes which are proven to be illegal? Have they the power to go behind the return of the judges of the election and decide on the illegality of votes? S. W.

Answer.—The law is invalid, and the Board of Aldermen cannot institute nor pass on any contest of election. Const. Mo. Art. 8, § 9; State, *ex rel. v. John*, 81 Mo. 13.

R. B.

### RECENT PUBLICATIONS.

LEADING CASES IN THE COMMON LAW. With Notes, (Third Edition). By Walter Shirley Shirley, M. P., Barrister-at-Law, of the Inner Temple, and the North-Eastern Circuit; Author of "A sketch of the Criminal Law," "An Elementary Treatise on Magisterial Law," etc. London: Stevens and Sons, 119 Chancery Lane, Law Publishers and Booksellers, 1886.

This is an admirable collection of leading cases and we are not surprised, after an examination of it, that it has been received in England with phenomenal favor, and has so soon reached its third edition. The cases, which are much more numerous than is usual in such collections, are very well selected and include almost every conceivable phase of the common law, and appended to each case is a note in which the principle established is very carefully and thoroughly brought down to date.

Mr Shirley takes in the whole range of the common law (excluding, however, cases which relate to title and tenure of land), and, in point of time, the work extends from such as *Twyne's Case*, the *Six Carpenters' Case*, *Semayne's Case*, down to the latest modern deliverance on the subjects of negligence and contributory negligence. The statement of facts of each principal case and of the doctrine which it embodies is clear and remarkably brief, and the note sets forth, with much precision, the application or modifications of the doctrine to be found in subsequent cases.

The work of Mr. Shirley is especially designed and adapted to the use of law students, and will undoubtedly be found very serviceable to them, but is hardly, if at all, less valuable to the practitioner who will find in it clear and concise statements of the law bearing upon a great variety of subjects, and fully fortified by ample citations of authorities.

There are three appendices, which are quite useful to the English reader, and in a less degree to the American. In the first (A) will be found the more important sections of the principal statutes referred to in the work. The second (B) contains short abstracts of equity and conveyancing leading cases. The third (C) is a list of the principal legal maxims.

In the preface is an apology which is certainly unique and, we think, utterly superfluous. Mr. Shirley says: "The tone of flippancy and jocularity, modified to some extent in the second edition has been almost discarded in this." We are light-minded enough to lament the excisions. If Mr. Shirley is able to infuse anything of fun or "jocularity" into so dry a bundle of sticks as a collection of leading common law cases, we say: May he live long and prosper. "Dost think that because thou art virtuous there shall be no more cakes and ale?" And because thou art learned, shall there be no more—

"Quips and cranks and wanton wiles,  
Nods and becks and wreathed smiles."

Mr. Shirley's style, notwithstanding his merciless exclusion of wit and humor, is neither stilted nor severe, and, taken altogether, we think his book is worthy of very high commendation.

AMERICAN CRIMINAL REPORTS. A series designed to contain the latest and most important criminal cases determined in the Federal and State Courts in the United States, as well as selected cases important to American lawyers from the English, Irish, Scotch and Canadian Law Reports, with notes and references, by John Gibbons, LL.D., of the Chicago Bar. Vol. V. Chicago: Callaghan & Co., Law Book Publishers. 1886.

This is manifestly a valuable series for the use of lawyers engaged in the practice of criminal courts. The volume before us is well arranged, the cases judiciously selected, and the annotations learned and pertinent. Appended to the volume is a succinct account of the latest sensational criminal case—that of the Chicago anarchists, Spies and others, which is sufficiently full up to the rendition of the verdict. As the case will be revised by the Supreme Court, such questions of law as are involved in it, will doubtless appear in a future volume.

It is almost superfluous to say that, like all the books issued by Messrs. Callaghan & Co., the volume before us is, in every respect, typographically perfect.

### JETSAM AND FLOTSAM.

"Why do you refuse to answer the question, madam?" asked a lawyer of a lady witness, scenting a favorable disclosure.

"Because my answer ought not to be heard by any honorable person," replied the witness.

"Well, then, madam," said the counsel, "whisper it in the ear of the judge."

**MOTHERS-IN-LAW.**—Mothers-in-law are no doubt a nuisance, and some abuse of them is to be naturally expected from all right-minded sons-in-law. One Seymour has, however, now learnt that, although it may be quite safe to call his mother-in-law "a vicious nasty old cat" to her face, it is not advisable to tell her so on a post-card. Many other dreadful things did the defendant write about his mother-in-law. Evidently his feelings to her could not have been friendly. Hearing that she had kissed his child in the street, he had the youngster stripped, ducked in water, and cleansed from the pollution of her kiss. The luxury of abusing a mother-in-law in this way cost, however, £100, and probably the defendant will now expend less on post-cards.—*Gibson's Law Notes, Eng.*

Served him right! Who takes care of baby when papa and mamma go to the picnic? Who lets in dear Thomas when he comes home from the lodge, anywhere between midnight and day, too indisposed to be able to fit his latch-key in the key-hole? And who next morning holds his poor head when it is splitting because of the oysters he had eaten at the lodge supper?

And how mean! To attack her with a postal card, "for all the world to see." A man who will send a postal card to a woman, "save in the way of kindness"—we forget the rest of the quotation, but feel safe in saying "is fit for treason, stratagems and spoils."

**AN INSANE ADVOCATE.**—Appended to the Forty-ninth Annual Report of the Managers of the State Lunatic Asylum at Utica, for the year 1885, is a paper on insanity, in which the author gives the following case interesting to lawyers: "A lawyer telegraphed me from Syracuse that he would be at the asylum at a certain hour. I was absent in the city when the telegram came, and when he called, being told this, he left. Two days afterwards I got a telegram from him at Albany, saying that he would call again at a given hour, and requested me to have Governor Seymour and Judge Denio to meet him. He came at the appointed hour, and said to me: 'I called yesterday to consult you because I have for some time past felt so strangely that I thought I might be out of my mind, but I have just been to Albany and argued an important case before the Court of Appeals, and feel satisfied

that I do not need advice.' I saw from his manner and speech that he was very insane, and said to him, 'You seem to be very insane now.' He said, 'Well, perhaps I am excited. I have been at times irrational, I know, but for the most part I am rational.' Soon afterwards he was brought to the asylum, and declared himself to be President of the United States, and finally said that he was the Ruler of the Universe. Judge Grover, of the Court of Appeals, said to me that he had heard his 'argument,' which was partly a Fourth of July oration, and partly an attack on the courts, and that he was an insane man."—*Albany Law Journal.*

**A NICE POINT OF LAW.**—In 1878 a Mexican soldier deserted from Nuevo Laredo, while the company were at the river bank, and swam to this side. The guards and officers fired at him until he had reached the middle of the river, when all ceased but one, a captain named Rafael Pinal, who continued, and finally, after the deserter had reached this side, the captain shot him. He dropped dead in his tracks. The captain never crossed to this side and consequently was not arrested. To-day Deputy Sheriff Yglesias saw him on the streets of the city and forthwith arrested him, and he is now lodged in jail. A nice point of law is embodied in this case, as the murderer was in Mexico when he committed the deed, although the victim was in the United States.—[Laredo, Tex., Oct. 5, special to *Globe-Democrat.*]

The following will was filed in the register's office for registration, which we give verbatim:

13 Civil Deedistrict Oct 1 | 886  
a Will Made By Henry Lewis to his wife and 3 Children and 1 Grand Son Wife An Lewis oldest Son Samuel Lewis daughter Emer Lewis youngest Son Henry Lewis Grand Son Jonney Gilliland I do Will all that I perress to these four pursons

Cows 9 calfs 9 Horseses 3 one Gray Mare an one Bay horse Pony one Soil Pony

on his dying Bed  
Witness  
Samual H Jones  
Samual Louis

**THE LAW AS SHE IS WRIT.**—We were shown this morning by Constable Robinson, of this city, a unique and decidedly original legal document prepared by a landlord of this city, who believes "in every man being his own lawyer." It is a "Notice to Leave Premises" served on one of his tenants, and prepared by filling out the usual blank forms. The *rara avis* is before us, and we submit a copy, thinking it may interest your readers. The words italicized are those filled in.

"NOTICE TO LEAVE PREMISES.  
To Mr. John Handlen:

You are hereby notified to leave the following premises, now occupied by you, to-wit: *That you have not payed Your Rent According to Contract, so you must leave within 3 days after date by the law of Franklin City,* and all the appurtenances thereto belonging and rented within three days from the date hereof: And that upon your failure to do so I shall have recourse to legal measures to obtain possession of the same Dated at March 6th this Being the day of Judgment 1886.

L. S. (In German.)"  
It is unnecessary to state that the startling announcement at the close had the desired effect of making the tenant in every instance "git." While the landlord's name in bristling German letters must have appalled and terrified him in the highest degree. We give the notice *verbatim et literatim.*—[Columbus, Ohio, correspondence *Ohio Law Bulletin.*]